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The novel question of a wife's right to recover damages for the unlawful dissection of her husband's body before burial arose for the first time in Larson v. Chase decided by the Supreme Court of Minnesota, and commented on in 34 Cent. L. J. 43. The same question has recently come before the Supreme Court of New York in Foley v. Phelps, 37 N. Y. Supp. 471. In both cases it was very properly held that the wife could recover. The only difficulty in such cases is in determining the nature of the right that has been infringed. In an old Indiana case there is a *dictum* by one of the judges, that corpses are property in the strict sense of the common law. Bogert v. City of Indianapolis, 14 Ind. 134. In Pierce v. Proprietors, etc., 10 R. I. 227, it was denominated a *quasi* property right. In Foley v. Phelps, *supra*, the court following substantially the doctrine of Larson v. Chase declared that a surviving wife is entitled to the possession of the body of her deceased husband in the same condition as when death occurred for the purposes of giving it proper care and burial. As the *Harvard Law Review* in commending the decision well says that "even if so clearly defined a legal right did not exist, the courts would probably have no trouble in supporting an action of this sort on some broader ground. It is one of those instances where failure of justice would involve such a shock to every feeling of decency and propriety that the law positively must disclose a principle to cover it. The development in recent times of such rights as the right to privacy shows that the common law is ever ready to expand in response to demands of that nature." A seemingly *contra* rule has been laid down in a case where the deceased died suddenly and an autopsy was performed by a physician at the establishment of undertakers to which the remains had been conveyed, in order to enable the physician to give the certificate as to cause of death required by law. Cook v. Walley (Col.), 27 Pac. Rep. 950.

In 1894 the legislature of Indiana passed an act which is a copy of the Civil Rights Bill, enacted by congress, entitling all persons equally to the enjoyment of the "accommodation, advantages, facilities of inns," etc., and making any person denying them liable in damages. This act has recently been applied by the appellate court of that State in the case of Fruchey v. Eagleson, 43 N. E. Rep. 146. It appeared from the facts in that case that the students of the Wabash College Football team had made arrangements to entertain the Indiana University Football team, of which the plaintiff, a college student, was a member, and the members of the Indiana Football team assented to the arrangement. A representative of the entertaining team applied at the hotel for accommodations, and the manager, taking exception to the color of the student, said that he would only permit him to lodge there on condition that he would take his meals in the "ordinary," away from the other guests. We infer that the team stood by its colored brother, and the entire body refused to lodge at the hotel. The plaintiff then brought his action, under the statute, against the proprietor of the hotel, and recovered before a jury, which verdict was sustained by the Appellate Court of Indiana. Besides the application of the statute to the facts in the case there were some questions of pleading of minor importance.

The case of Glidden v. Mechanics' Nat. Bank recently decided by the Supreme Court of Ohio should serve as a warning to banks and holders of collateral notes. In that case it was held that a bank selling collateral pledged with it as security for a loan cannot buy in the same at the sale, unless this is authorized by the agreement under which the pledge was made. The principle upon which the decision is founded has long been established, but the question has seldom arisen upon a collateral note. It has always been the law that a pledgee of property cannot, directly or indirectly become a purchaser at his own sale for the satisfactory reason that he holds the property in a fiduciary capacity which forbids the disposition of it for his personal benefit and requires good faith and fidelity to the interests of the pledgor in making a sale of it. His duty as a seller is inconsistent with his interest as a purchaser and the principle that a trustee

cannot be a purchaser at his own sale is applicable.

The court held the sale, for the reasons stated, void. Had there been embodied in the collateral note an express agreement that the pledgee might become the purchaser at any sale which should be made, the difficulty would have been obviated.

NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE—KILLING OF GAME—SALE OUTSIDE OF STATE.—The case of Geer v. State of Connecticut, 16 S. C. Rep. 600, decided by the Supreme Court of the United States, involved important questions of constitutional law as to sale of prohibited game in another State, the holdings of the court being that the interstate commerce clause of the constitution does not affect the right of a State to prohibit the transportation outside its limits of game killed in the State; that the ownership of the wild game within the limits of a State, so far as it is capable of ownership, is in the State for the benefit of all its people in common, and that the police power residing in a State authorizes it to forbid the killing of game within the State with intention to procure its transportation beyond the State limits. Mr. Justice White delivered an exhaustive opinion for the court, and Mr. Justices Field and Harlan dissented.

CRIMINAL LAW—HOMICIDE—SELF-DEFENSE.—In People v. Conkling, 44 Pac. Rep. 314, decided by the Supreme Court of California, the nature and extent of the right of self-defense were discussed. The court takes radical ground in favor of such right, and the discussion is of interest in view of the position that has been asserted in some cases and by some text-writers, that a person who has reason to suspect that he may be attacked is under a duty to avoid going where his enemy may be expected to be.

TELEPHONE COMPANY—PUBLIC STATION—DUTY TO FURNISH MESSENGERS—NEGLIGENCE—DAMAGES.—The Appellate Court of Indiana holds in Central Union Tel. Co. v. Swoveland, 42 N. E. Rep. 1035, that it is the duty of a telephone company which maintains a line between different cities and towns, with stations in such towns for the use of the public on payment of tolls, to furnish a suitable messenger service for the purpose of notifying persons, within a reasonable distance, when its patrons at other stations desires to communicate with them; and for the neglect or omission of such messengers, it is responsible within proper limits; that while a telephone company has the right to adopt reasonable rules, a regulation that it will not be responsible for the negligence of messengers sent from its stations, who must of necessity be of its selection and under its control, but that they shall be deemed the agents of the patron at whose instance they are sent, is void, and that where by reason of the delay of a telephone company in calling a veterinary surgeon to its station, as it undertook to do, he lost several hours in reaching a horse to attend which he was called, and meantime the animal died, the value of the horse cannot be considered as an element of damages in an action by its owner against the telephone company for negligence in failing to sooner place him in communication with the surgeon; the question as to whether the horse would have been saved had the messenger taken the call at once being entirely a matter of speculation.

GARNISHMENT OF RECEIVER.—That a receiver appointed in an action brought by one partner to wind up and administer the affairs of an insolvent firm, cannot be garnished by a firm creditor without leave of the court which appointed him, is made clear by the decision of the Supreme Court of Wisconsin in Blum v. Van Vechten, 66 N. W. Rep. 507. The court has this to say on the subject:

It is said that the landlord's liability to his tenant is more restricted than it is to third persons, and this is unquestionably so, in so far as it rests upon the contract between the parties, and want of care in the tenant; but, in this and similar cases, there is a separate and distinct ground of liability, depending, not upon contract or want of contract, but upon the obligation the landlord or landowner is under to his tenant, as well as third persons, not to expose them to danger which he knows or could know by the exercise of reasonable diligence. The rule laid down does not place upon the landlord the obligation of an insurer or warrantor by contract, nor does it impose the extreme duty of constant care and inspection, but it does impose upon him the duty of reasonable care and diligence to inform himself of the condition of the property which he proposes to let; and if, when he leases, he knows, or by the exercise of reasonable

care and diligence should know, that the premises are dangerous, it is his duty to make them safe before he leases, or inform the tenant of their condition; and if he does not, he must respond, to any person not in fault, for damages caused by such condition of the premises, whether tenant or third person. Nor does this holding imply, as counsel suggests, that the tenant is thereby entirely relieved from the duty of proper diligence on his part, and that the landlord is virtually made guardian for the tenant. The obligation of the tenant to exercise proper diligence was properly stated by the trial judge, and there is nothing in the ruling of this court that can legitimately bear the construction given to it by counsel to relieve the tenant of such care.

The contention in the Sternberg case is, mainly, that, being a boarder, she was the guest of the tenant, and not a third person in the eye of the law. It suffices to say, upon this point, without noting other considerations, that the evidence shows that the house was let to be used as a boarding house, and recommended by the landlord for that purpose. If it was unsafe for that purpose, which is a *quasi* public purpose, and defendant knew it, or could by reasonable care and diligence have known it, he should respond in damages to any person injured on the premises. The boarder is there as much by invitation of the landlord as of the tenant. She is there, not strictly as a guest, but as a third person, legitimately on the premises on business, for the purpose for which they were let. The rule is that, if the landlord is guilty of *delictum* or negligence, he is liable; otherwise, not. And in this view of the case, the tenant and his boarder stand upon the same footing, the contract being out of the way. The tenant may have more extensive rights if she expressly contracts for safe premises, and is assured of their safety; and, on the other hand, her rights may be restricted if she is guilty of negligence in ascertaining for herself the condition of the premises when she rented them, or took them knowing them to be unsafe. The rule, as laid down by this court, imposes reasonable care and good faith on both landlord and tenant, in the absence of a contract to make the premises safe, or a warranty of their condition; and keeping this rule in view, the tenant and his boarder are entitled to as much protection against the landlord as is the stranger passing along the street, or occupying adjoining premises. It cannot be the law that the owner of an hotel which is in an unsafe condition, known to him to be so, or by reasonable care and diligence he could know, can lease it to a tenant, who exercises reasonable care and diligence, and does not discover the danger, and then escape liability to either the keeper of the hotel, or his family or servants, or the persons who enter the hotel for its accommodation. What the hotel keeper's liability may be at the same time is not a question now before us. While many of the cases cited in the opinion are cases where the liability was held to exist as to third persons, there is no difference between third persons and the tenant and his servants, the matter of contract and negligence of tenant being out of the way, as is said in Cowen v. Sunderland (Mass.), 14 N. E. Rep. 117. There is an exception to the general rule of *caveat emptor*, as between lessor and lessee, "arising from the duty which the lessor owes the lessee. This duty does not originate directly from the contract, but from the relation of the parties, and is imposed by law." We quote from Wood on Landlord and Tenant (page 855): "Where there are defects in the premises, not open to ordinary observation, of the existence of which the landlord knows, or ought to know, which are dangerous to the person of the tenant, it is his duty to disclose them to the tenant; and if he fails to do so, and the tenant is injured thereby, the landlord is responsible for all the damages that ensue to the tenant therefrom." Again (page 869), the same author says: "But, when the premises at the time when they are leased, are in so defective a condition as to be *per se* a nuisance, especially when they are leased for a *quasi* public use, the landlord is responsible for injuries resulting either to the tenant or third persons lawfully upon the premises therefrom."

The rule laid down by this court, and (as we think) sustained by authority and reason, is that, in the absence of a contract to repair, or warranty of condition, both the landlord and tenant must use reasonable care and diligence. If the tenant neglect such reasonable care and diligence to ascertain the condition of the premises, or knowing their condition, assumed the risk, then he cannot recover against the landlord. On the other hand, if the landlord neglect to use reasonable care and diligence in ascertaining whether his premises are safe, or if he actually know they are unsafe, and conceals or misrepresents their condition, then he is liable, the tenant being in no fault. It is not upon the ground of an insurer or warrantor of condition under his lease contract, but on the ground of the obligation implied by law not to expose the tenant or the public to danger which he knows, or in good faith should know, and which the tenant does not know, and cannot ascertain by the exercise of reasonable care and diligence. The cases are numerous which use the expressions, laid down in the opinion in this case, that the landlord is liable, not only for actual knowledge, but also for reasonable care and diligence in obtaining such knowledge—not only when he knows, but when he ought to know, of the defects by using ordinary care and diligence. As using this expression, we cite, among others, Martin v. Richards, 155 Mass. 381, 29 N. E. Rep. 591; State v. Boyce, 73 Md. 469, 21 Atl. Rep. 322; Carson v. Godley, 26 Pa. St. 111; Coke v. Gutkese, 44 Am. Rep. 499. In the late case of Lindsey v. Leighton, 150 Mass. 288, 22 N. E. Rep. 901, it was held that it was not necessary to show that the owner had actual knowledge of the defects. His duty was that of due care, and ignorance of the defect was no defense, in the absence of such care. In Moynihan v. Allyn, 162 Mass. 272, 38 N. E. Rep. 497, it was held that it was the duty of the landlord to inform the tenant of any hidden defects, which could not be discovered by reasonable diligence on his part, and of which the defendant ought, for his proper protection, to be informed; citing quite a number of other Massachusetts cases. Mr. Pingrey says, in section 592 of his work on Real Estate: "Of course, if there is a conceded defect which renders the premises dangerous, which the tenant cannot discover by the exercise of reasonable diligence, of which the landlord has or ought to have knowledge, it is the landlord's duty to disclose it, and he is liable for an injury which results from his concealment of it." In section 594 the same author says: "It is held that the obligation and liability is the same to the tenant's guest and to his servants, and the landlord is liable unless it appears that he did not know, or by reasonable care and diligence could not have known, of the unsafe condition of the premises when he leased them."

Under the principle we have attempted to lay down, the landlord's liability, leaving the contract of lease out of view, is the same to the tenant as to his servant, or his guest, or his customer, or his wife or

child, or to the stranger passing along the streets or on the premises for any legitimate purpose. The only case cited by counsel apparently holding a doctrine contrary to that laid down by this court is that of Burdick v. Cheadle, 26 Ohio St. 393. This case is also reported in 50 Am. Dec. 782, and referred to as a peculiar case, and, as we think, very justly criticised, as placing the party injured in a very anomalous position. The case is clearly out of line with the current of authority. It may be remarked, however, that in that case the court said: "Whether the noxious structures existed at the time the lessees entered into possession of the storeroom does not appear." As illustrative of the application of the rule we have laid down, we cite the following, among other cases, showing when the rule is applied, and as to what persons held applicable: In Swords v. Edgar, 59 N. Y. 28, a longshoreman in the service of the tenant sued the owner, and recovered. In Godley v. Hagerty, 20 Pa. St. 387, a servant of the tenant sued the owner, and recovered. In Carson v. Godley, *supra*, a customer of the tenant sued the owner, and recovered. In Ceser v. Karutz, 60 N. Y. 229, the owner was held liable to the child of the tenant. In Coke v. Gutkese, *supra*, the owner was held liable for injuries sustained by a child of the tenant. In Martin v. Richards, 155 Mass. 381, 29 N. E. Rep. 591, three cases were tried together, and the owner was held liable for an injury to the child and wife of the tenant. In Minor v. Sharon, 112 Mass. 477, three cases were tried together, and the owner was held liable for injuries to the tenant's children. In State v. Boyce, 73 Md. 469, 21 Atl. Rep. 322, the owner was held liable for injuries to the servant of the tenant. In Gill v. Middleton, 105 Mass. 477, the owner was held liable for an injury to the wife of the tenant. In Nugent v. Railroad Co., 80 Me. 62, 12 Atl. Rep. 797, the owner was held liable to persons rightfully on the premises. In Nelson v. Brewing Co., 2 C. P. Div. 311, the right of the servant of the tenant to sue was recognized. In Moynihan v. Allyn, 162 Mass. 272, 38 N. E. Rep. 497, the right of the child of the tenant to sue was recognized. And Mr. Pingrey, in his work on Real Property, expressly states that there is no distinction in the rule as to the liability of the owner to the tenant or to the tenant's guest, or to the tenant's servant. In each instance he says the rule is the same.

NEGOTIABLE INSTRUMENT — PROMISSORY NOTE—ALTERATION BY PAYEE.—It is held by the Supreme Court of Ohio, in Newman v. King, that the date borne by a promissory note is a material part thereof; and if the payee, without the knowledge or consent of the maker, alter its date after the note has been delivered to him, such act renders the instrument void even in the hands of an innocent indorsee for value. After stating the general propositions as to the effect of alteration of a note, the court says:

The defendant in error contends that, although the date which a promissory note bears may be a material matter, yet that as the note in controversy, according to the intention of all the parties to it, should have been dated June 23d instead of June 22d, 1890, an alteration made by the payee honestly and in good faith after its delivery to him, that merely caused the instrument to express the date intended, even if done without the knowledge or consent of the makers, would not render the note void. This contention finds support from reputable authorities. In Decker v. Franz, 7 Bush (Ky.), 273, a promissory note had been dated in 1868, and the payee altered the date to 1869 by changing the figure "8" to "9" without the knowledge or consent of the maker. The court maintained the validity of the note on the ground that in its altered condition it conformed to the intention of the parties. The same doctrine is maintained in Mississippi. McRoven v. Crisler, Admr., 53 Miss. 542; in Maine, Hervey v. Hervey, 15 Me. 357. In the latter case, however, great weight was given to the fact that the maker knew of the mistake, while the other parties did not, and the court seemed to be of opinion that his attempt to avail himself of the alteration as a defense constituted a fraud upon the plaintiff. *Ib.* 359; Clute v. Small, 17 Wend. 238; Brown v. Jewell, 2 N. H. 543.

Other cases, cited as sustaining this doctrine, do not support it to the extent claimed for them. Thus, in Johnson v. Johnson's Estate, 66 Mich. 525, which was an action to charge the estate of the principal maker of a promissory note for the debt evidenced thereby, a note had been given on October 23, 1876, for the balance due on an account stated between the parties, but by mistake was dated October 23, 1875. The trial court found that the payee honestly, and with no fraudulent intent, changed the "5" to a "6." This was done without the knowledge or consent of the makers. Afterwards the principal made two payments on the note, upon which circumstance some stress was placed by the court, although it does not appear that he knew of the alteration when the payments were made. The wife of Johnson had signed the note as surety. The court seemed to be of opinion that the alteration changed the contract and discharged the wife, for the court said "the fact that Mrs. Johnson was not bound by the note would not discharge her husband for whom she signed as surety." The claim was allowed against the estate of the principal. The reasoning of the court is not very clearly set forth, but sufficient appears to show that the decision was quite as much due to the theory that the original consideration, the account stated, would support the claim as to any other principle; the court saying: "And furthermore the account stated, which was the foundation of the note, would form a new basis of indebtedness."

In some cases the alteration was sustained on the ground that it was made by an agent of the maker, or drawer, before delivery. Brett v. Pecard, Ryan & Moody, N. P. 37; Van Brant and Slaight v. Eoff, 35 Barb. (N. Y.) 51. In other cases the note or bill of exchange was held valid, notwithstanding the insertion of a word without the knowledge of the maker or drawer, upon the ground that the word inserted was implied by the contents of the instrument.

The question raised by the instructions given and refused, relate solely to the effect to be given to a promissory note, after its date has been altered by the payee without the knowledge or consent of the maker.

The question is one of public policy. Doubtless, all minds will concur in the proposition that after a written instrument has been altered in a material matter, it no longer retains its identity; it is in fact a new contract, and imposes obligations and secures rights different from those it imposed or secured at its origin. Nor will any reasonable mind contend that one of the parties to a written instrument may alter it without the consent of the others so that it will ex-

press anything not intended by the parties. The contention is, however, that it may be altered by one party alone without the knowledge or consent of the others, if, in its altered condition, it conforms to the intention of the parties, and the alteration was honestly made; and that, that being true, it may be enforced in its altered condition. The reasoning is that, as, in its changed condition, it expresses the intention of the parties, no injury has been done by the alteration. That, no doubt, is true in every case of an alteration in so far as it concerns the parties affected by it. If, in its altered state, it requires the obligor to do the particular thing he agreed to do, no personal wrong has been inflicted on him. In this view of the matter the number and extent of the alterations are immaterial, for however great and numerous they may happen to be, the instrument in its changed condition requires the obligor to do just what he promised, and therefore, in good conscience, ought to do. The question, however, does not rest solely upon this aspect of the matter. Regard should be had to the policy of maintaining the integrity of written instruments; particularly those whose character or nature is such that their possession and custody belong to one party only. Promissory notes are of this class. This policy, we think, denies to the custodian of a written instrument, to whose possession its nature necessarily confides it, the power to alter its terms in any material matter whatever, in order that it may conform to his notion of what the parties intended when it was executed.

LANDLORD AND TENANT—DANGEROUS PREMISES.—The Supreme Court of Tennessee, on rehearing in the case of Hines v. Wilcox, 34 S. W. Rep. 420, affirming the original opinion 33 S. W. Rep. 914, hold that a landlord is liable to his tenant, and also to a boarder of his tenant, for injuries resulting from a defect in the premises, which were leased for a boarding house, of which the landlord, by the exercise of reasonable care, might have known at the time the premises were leased, and which was unknown to both the tenant and the boarder, and could not have been known by the exercise of reasonable care. The following is from the opinion of the court:

The appellants' counsel concedes that it would be a contempt of the court appointing him to interfere with a receiver's possession of property pertaining to his trust, and received by him in that capacity, and that an actual levy on property, or attachment of the same, could not be made without leave of the court which appointed him. This concession is fatal to the plaintiff's contention in support of the garnishment of the receiver; for, if the process of garnishment should be effectively prosecuted, it would necessarily result in depriving the receiver of the property rightfully in his possession, without the leave of the court appointing him, in order to satisfy the plaintiffs' demand. The claim that the garnishee action is not against the receiver in his official, but in his personal capacity, though affecting the title and right of possession of such property, is an evasion of the difficulty, and cannot be maintained. Whether the action affects him in his official capacity, and not the mere manner or style in which he is named in the process, is the true test. The question is not one of mere form, but of substance, and whether the receiver, in his official capacity and rights, is to be affected by the action. High, Rec. §§ 256, 257. The rule is otherwise where the receiver takes possession or holds property which does not pertain to his office, and where he is a mere trespasser (Beach, Rec. § 660); or where he is sued to recover damages as for a tort, and there is no attempt to interfere with the actual possession of the property which he holds under the order of the court appointing him. Kinney v. Crocker, 18 Wis. 74; Wood v. Crocker, *Id.* 345. The better opinion seems to be that the privilege of the receiver is not personal, but pertains to his trust, and exists for the protection of the rights of those whom he represents, and that, where the prosecution of the action would affect or interfere with the control of the property rightfully in his custody, he cannot waive it without the consent of the court. Otherwise, the protection which the court interposes against unwarranted interference with its own officers, and depredations upon the estate in its charge and custody, would be broken down, and confusing and embarrassing questions in its administration would ensue. Beach, Rec. § 653. There are, however, authorities which hold that the receiver may waive the objection.

The possession of the receiver is the possession of the court appointing him, and the property in his hands as such is not subject to attachment, nor is he subject to garnishment on account of it, or funds in his hands or subject to his control in that capacity. Where a receiver has been properly appointed of the property and effects of a partnership, he cannot be garnished in an action brought by a creditor of the firm or upon a judgment recovered therein; as a judgment upon the garnishment, if recognized and enforced, would divest and defeat the previously acquired jurisdiction of the court in the equitable action to administer and apply to proper purposes the property and effects of the partnership. The authorities to this effect are too numerous and decisive to admit of question or doubt. High, Rec. §§ 151, 164; Beach, Rec. § 228, and cases cited; 8 Am. & Eng. Enc. Law, 1145, and cases in note; Jackson v. Lahee, 114 Ill. 287, 2 N. E. Rep. 172; Book Co. v. De Golyer, 115 Mass. 67; Com. v. Hide & Leather Ins. Co., 119 Mass. 155; Holmes v. McDowell, 15 Hun, 585. In the case last cited, the action was to administer and distribute the assets of an insolvent partnership equally among its creditors, and to adjust its affairs, and a receiver was appointed by stipulation. Subsequently, and during the pendency of the action, certain creditors of the partnership recovered judgments against the firm upon which supplemental proceedings were instituted, in which the same person was appointed receiver as in the partnership action, and such creditors applied in the latter action to have the receiver directed to pay their debts in full; but it was held that the judgments they had recovered, and the proceedings under them, gave them no priority over the other creditors of the firm, and their application was denied. In that case the court held that the owners of the partnership property had, by their voluntary act, placed it in the hands of the court for equal distribution, and that the court had assumed jurisdiction over it for that purpose; that it had not yet made its order of distribution, but, by the appointment of its receiver, it had assured all persons interested that it would make that order in due time, and, until it settled the terms thereof, it would hold it for that purpose; and that the property, or fund from its sale, was in the hands of the court, and any one interested

might quicken its action by proper application, and that the court held the property in trust for the benefit of those who might be entitled to it, and that all might be properly protected; that the property, when once in the hands of the court, was pledged and dedicated to the objects of the proceeding, and in it others became interested, who had a right to invoke the action of the court that had thus assumed control over it; and that the creditors of the firm were the *cestuis que trustent* of the court, and could not be defrauded, unless the court should lend itself to the fraud. This decision was affirmed in 76 N. Y. 596, on the ground stated in the prevailing opinion. This view is supported by Van Alstyne v. Cook, 25 N. Y. 489; Law v. Ford, 2 Paige, 310; Maynard v. Bond, 67 Mo. 315.

CRIMINAL LAW — LARCENY — BRINGING STOLEN PROPERTY FROM A FOREIGN COUNTRY. —In State v. Morrill, 33 Atl. Rep. 1070, decided by the Supreme Court of Vermont, it was held that one who steals property in another country and brings it into Vermont is guilty of larceny in Vermont, on the principle that the legal possession of the property remains in the true owner, the taking having been felonious and that every aspiration is a fresh taking. The court said in part:

For a hundred years our courts have held the common law to be that one who steals property in another country, and brings it into this State, is guilty of larceny here. The same is true of one who steals in another of the United States and brings the property here. The first reported case in respect of stealing in Canada is State v. Bartlett, 11 Vt. 650, decided in 1839. It was there said that the rule had been too long settled, and recognized by too long and uniform a course of practice and decision, to be changed except by legislative action. That was 57 years ago. The rule has not been changed by legislative action, although the attention of the legislature was then specifically directed to the matter, and hence it is fair to infer that the legislature has been satisfied with the rule. If it was too late then for the court to change the rule, it is certainly too late now. Nor can it be changed except for reasons that would equally call for its abrogation in cases of property stolen in another State of the Union and brought here, for the States are as independent of one another in respect of their jurisdiction as they are of foreign countries. Two States—Massachusetts and Ohio—have attempted to distinguish between the thief who brings therein property stolen by him in another State and the thief who does the like with property stolen by him in another country; convicting the one and acquitting the other. Com. v. Uprichard, 3 Gray, 434; Stanley v. State, 24 Ohio St. 166. But we think that no such distinction can be made, and that both cases stand on precisely the same ground. We could not, therefore, abrogate the rule as to one without abrogating it as to both, which we are by no means prepared to do. We are satisfied with the rule as matter of policy, as was the court in State v. Bartlett; for our law should not be such as to induce thieves to come here with their plunder. We are satisfied with it on principle, for every asportation is a fresh trespass and a fresh taking, and so, as matter of law, you have a felonious taking and carrying away in this State, since the possession as well as the title of the property is deemed to continue in the owner, notwithstanding the original taking, as that was felonious. It is upon the precise ground that in England one who steals goods in one country and carries them into another may be indicted for larceny in the latter, though he can be indicted for robbery only in the country where the force or putting in fear was. It is true, they do not extend the rule to cases where the property was stolen abroad; and the principle of the rule is logically capable of such extension, and it, in effect, receives such extension in this country when a thief is convicted of larceny in one State for bringing in goods that he stole in another State, which the States very generally do, though some do not. On this ground it is that one who steals my goods from one who had stolen them may be indicted as having stolen them from me. Ohio denies the principle altogether, and says that a mere change of place by the thief while he continues in the uninterrupted and exclusive possession of the stolen property does not constitute a new taking, either in law or in fact, and yet she convicts of larceny the thief who brings goods into the State that he stole in another State, but upon what ground is not obvious. Larceny of the same goods by the same person may be committed any number of times; and this offense, like every other, is punishable in the jurisdiction in which it is committed. We cannot punish for offenses against a foreign law, but only for offenses against our law. But a man cannot bar prosecution for a criminal act here on the ground that he committed a like act elsewhere. A man can neither be punished nor escape punishment here because he stole the same goods in another State or country. 1 Bish. Cr. Law, 7th ed., sec. 137. This question is so fully discussed in the cases, and the reason for the different holdings so fully stated, that further discussion here is unnecessary. We may say, however, that Maine holds with us in the question here involved. State v. Underwood, 49 Me. 181.

COVENANTS IN LEASE.

Sec. 1. *Definition — How Created.* — Strictly speaking, a covenant is an agreement between two or more persons, entered into in writing, executed under the solemnities of a seal;[1] but as used in this connection covenant signifies the agreement which appears in a lease, binding the parties to perform or give certain things, whether

[1] Anderson's L. Dict. 287; 1 Bouv. L. Dict. (15th ed.) 447.

the lease is undersealed or not.[2] No particular form of words is necessary to create a covenant. Whatever shows the intention of the parties to bind themselves to the performance of a stipulation may be deemed a covenant, without regard to the form of expression.[3]

Sec. 2. *Kinds of Covenants.*—The only kind of covenants in which we are interested in this connection are express and implied, personal and real. Covenants are inserted in leases for the purpose of limiting or otherwise defining the rights and duties of the parties; but if no express agreement in this respect is contained in the lease, the rights and obligations of the parties are regulated by law. As thus distinguished, covenants are either express or implied, that is, are either covenants in deed or in law.

Sec. 3. *Same—Express and Implied Covenants.*—The covenants of a lease of lands are either to be found fully set forth in the instrument of lease, or to be implied from the terms used therein, and for that reason such covenants are known as express and implied covenants. As with conditions, any covenants agreed upon between the parties, which do not contravene the law, may be inserted in a lease, entirely changing the common law rights and liabilities of the parties.

Sec. 4. *Same—Implied Covenants of Lessor.*—There are certain covenants in a lease incident to the relation of lessor and lessee, and for that reason are implied in law,[4] and may be exacted independently of express stipulation.[5] Implied covenants are such as arise by construction from the use of certain words or form of expression. The covenants usually implied on the part of the grantor are that he has a title and therefore a right to make the lease, and that, in consideration of the rent to be paid him, the lessee shall not be disturbed in the possession by the lessor or those claiming under him, during the term of the lease. The American doctrine differs materially from that held in England on this point, which is, that "he who lets agrees to give possession, and if he fails to do so the lessee may recover damages against him and is not driven to bring ejectment."[6] This doctrine, however, is followed in Alabama. In King v. Reynolds,[7] the court says: "We hold that where there is a contract of lease and no stipulations to the contrary, there is an implied covenant on the part of the lessor that when the time comes for the lessee to take possession under the lease according to the terms of the contract, the premises shall be open to his entry. In other words, there shall be no impediment to his taking possession. But this implied covenant or agreement does not extend beyond that time. If, after the time the lessee is entitled to have the possession according to the terms of the contract, a strange person take possession and holds, that is a wrong done to the lessee, for which the lessor is in no way responsible. And this is the rule whether the trespass is committed before or after the lessee obtains actual possession. The lessor's covenant extends no farther than to guaranty he had authority to make the lease, and that the premises will be open for occupancy when the contract gives the lessee the right to enter."[8] There is no implied covenant on the part of the lessor as to the condition of the premises demised, or that they are fit for any particular purpose,[9] or that they shall remain in the condition in which they are when taken throughout the term for which they are demised;[10] and if the premises are leased for a particular purpose there is no implied covenant that they are suitable for that purpose.[11] In the letting of a fur-

[2] In Hayne v. Commings, 16 C. B. N. S. 421, 111 Eng. C. L. 420, it is said that the words "covenant" and "condition," when used in an agreement, do not necessarily mean an agreement under seal or a condition, in the strict legal sense of the word, but may, in order to effectuate the intention of the parties, be construed to mean "contract" or "stipulation." This, of course, has no reference to the common law form of the action to be used in the enforcement of the covenant in a lease. The action of covenant would lay only in the case of an agreement under seal signed and sealed by the covenantor. See Hinsdale v. Humphrey, 15 Conn. 431; Pike v. Brown, 61 Mass. (7 Cush.) 133; Goodwin v. Gilbert, 9 Mass. 510; Gale v. Nixon, 6 Cow. (N. Y.) 445; Maule v. Weaver, 7 Pa. St. 329; Johnson v. Mussey, 45 Vt. 419. See article by author: Essay on "Action of Covenant" in 4 Am. & Eng. Ency. of L. 463, 570.

[3] Masury v. Southworth, 9 Ohio St. 341, 352. See Savage v. Mason, 57 Mass. (3 Cush.) 500, 505; Trill v. Eastman, 44 Mass. (3 Met.) 121, 124; Gardiner v. Horson, 15 Mass. 504; Jackson ex d. Wood v. Swart, 20 Johns. (N. Y.) 85; Trutt v. Spotts, 87 Pa. St. 339; Taylor v. Preston, 79 Pa. St. 436; Great Northern R. Co. v. Harrison, 12 C. B. (3 J. Scott) 576, 609, 74 Eng. C. L. 575, 607; Williams v. Burrell, 1 C. B. (1 Man. G. & S.) 402, 429, 50 Eng. C. L. 401, 427; Courtney v. Taylor, 6 Man. & G. 851, 46 Eng. C. L. 850; Wolveridge v. Steward, 3 Moo. & S. 561, 30 Eng. C. L. 521.

[4] See Hamilton v. Wright, 28 Mo. 199; Mayor of New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538; Tone v. Brace, 8 Paige Ch. (N. Y.) 597; Ross v. Dysart, 35 Pa. St. Bishop St. Albans v. Battersley, L. R. 3 Q. B. D v. 539, 28 Moak Eng. Rep. 314; Williams v. Burrell, 1 C. B. (1 Man. G. & S.) 402, 409, 50 Eng. C. L. 401, 429; Surplice v. Farnsworth, 7 Man. & Gr. 576, 49 Eng. C. L. 574.

[5] Clark v. Clark, 49 Cal. 586; Bennet v. Womack, 7 Barn. & C. 627, 14 Eng. C. L. 283; Hodgkinson v. Crowe, L. R. 10 Chan. App. 622, 14 Moak Eng. Rep. 823; Wilkins v. Fry, 2 Swant. 249.

[6] Coe v. Clay, 5 Bing. 440, 15 Eng. C. L. 660.

[7] 67 Ala. 229.

[8] The courts cite, as following the English rule, L'Hussier v. Zallee, 24 Mo. 13; Hughes v. Wood, 50 Mo. ; Field v. Herrick, 14 Ill. App. 181.

[9] Libbey v. Tolford, 48 Me. 316; Foster v. Peyser, 63 Mass. (9 Cush.) 243; Dutton v. Gerrich, 63 Mass. (9 Cush.) 89; O'Brien v. Cappell, 59 Barb. (N. Y.) 497; McGlashan v. Tallmadge, 37 Barb. (N. Y.) 313; Cleves v. Willoughby, 7 Hilt. (N. Y.) 83; Mayer v. Moller, 1 Hilt. (N. Y.) 491; Hazlett v. Powell, 30 Pa. St. 293; Carson v. Godley, 26 Pa. St. 111; Scheppi v. Gindele (Pa.), 14 W. N. C. 31.

[10] Branger v. Maciet, 30 Cal. 624; Welles v. Castles, 69 Mass. (3 Gray) 223; Robbins v. Mount, 4 Robt. (N. Y.) 553, 33 How. (N. Y.) Pr. 241; Moore v. Webber, 71 Pa. St. 429; Hazlett v. Powell, 30 Pa. St. 293.

[11] Libbey v. Tolford, 48 Me. 36; Jaffe v. Harteau, 56

nished house for a year there is no implied covenant against noxious odors which render the house uninhabitable during a part of the year, where those noxious odors originate outside of the demised premises and were unknown to the lessor when the lease was executed.[12] Where the lease is drawn technically in form, with obvious attention to details, a covenant cannot be implied in the absence of language tending to the conclusion that the covenant sought to be set up was intended.[13]

Sec. 5. *Same—Same—Effect of.*—The lease need not be in writing to give rights to an implied covenant.[14] There is an implied undertaking on the part of the lessor that a lessee shall not be dispossessed or disturbed in his quiet enjoyment of the premises by the lessor, or by any persons claiming under him, or by any one having the legal title or right of entry to the land;[15] but there is no implied contract to indemnify the lessee against the wrongful acts of a trespasser or other person,[16] or against an action in ejectment brought by a third person not having legal title or right of entry;[17] or against the exercise of right of eminent domain by the State.[18]

Sec. 6. *Same — Implied Covenant of Lessee.*—There are covenants also implied on the part of the lessee. Thus there is an implied covenant to pay a stipulated or a reasonable rent on the part of the lessee as long as he occupies the premises without obstruction or molestation on the part of the landlord.[19] There is also an implied covenant on the part of the lessee that he will treat the premises in a proper and husbandlike manner,[20] and also in such a manner that no substantial injury shall be done to them by willful and negligent conduct on his part.[21] This implied obligation is as much a part of the contract as though it were incorporated in it by express language; it results from the relation of landlord and tenant, which the lease creates.[22] A lessee may enter into express covenant for the repair of the premises, and an unqualified covenant of this kind will compel him to repair, whatever may have been the cause of the damages,[23] but the implied covenant of the lessee extends only to repairs made necessary by his negligence. He is not liable to repair any damages done by the elements or strangers without his fault, where he used the land in a husbandlike manner.[24] Thus it has been said that a tenant for years, or from year to year, of a house, is bound to keep it wind and water tight,[25] and is bound to make reasonable and tenantable repairs; such as keeping the fences in order, replacing windows and doors broken during his occupation, and the like.[26] But in the absence of an express covenant a lessee is not bound to do painting, whitewashing, or other work of ornamentation;[27] and if the premises are accidentally destroyed by fire or otherwise, he will not be required to rebuild.[28]

Sec. 7. *Same—Distinction Between Express and Implied Covenants.*—There is a marked distinction to be observed between the express and the implied covenants in a lease, because one who enters into an express covenant will be bound by it although the lease be assigned over;[29] but he will

N. Y. 398, 15 Am. Rep. 438; Clarke v. Babcock, 23 Mich. 164.

[12] Franklin v. Brown, 118 N. Y. 110, 6 L. R. A. 770, 30 Cent. L. J. 300.

[13] See Bruce v. Fulton National Bank, 79 N. Y. 154, 35 Am. Rep. 505.

[14] Maule v. Ashmead, 20 Pa. 482.

[15] Wade v. Halligan, 16 Ill. 507; Foster v. Peyser, 63 Mass. (9 Cush.) 243.

[16] Gazzolo v. Chambers, 73 Ill. 75; Sigmund v. Wilkens, 16 Md. 35.

[17] Schuylkill v. Dauphan R. Co., 57 Pa. St. 271.

[18] Dyer v. Whitman, 66 Pa. St. 425; Frost v. Earnest, 4 Wart. (Pa) 86.

[19] Van Rensselaer v. Smith, 27 Barb. (N. Y.) 104, 140; Royer v. Ake, 3 Pa. St. 406; Kimpton v. Walker, 9 Vt. 191.

[20] Nave v. Berry, 22 Ala. 582; Miller v. Shields, 55 Ind. 71; Aughinlaugh v. Coppenheffer, 55 Pa. St. 347; United States v. Bostwick, 94 U. S. 53; bk. 24, L. ed. 65.

[21] United States v. Bostwick, 94 U. S. 53; bk. 24, L. ed. 65.

[22] Holford v. Dunnett, 7 Mees. & W. 352. See Auworth v. Johnson, 5 Car. & P. 239, 24 Eng. C. L. 545; Cheetham v. Hampson, 4 Durnf. & E. (4 T. R.) 318, 2 Rev. Rep. 397.

[23] See Gibbon v. Eller, 13 Ind. 128; Leavitt v. Fletcher, 92 Mass. (10 Allen) 121; Phillips v. Stevens, 16 Mass. 238; Abby v. Billups, 35 Miss. 618; Warner v. Hitchins, 5 Barb. (N. Y.) 666; Hoy v. Holt, 91 Pa. St. 88, 36 Am. Rep. 559; Walton v. Waterhouse, 2 Saund. 422.

[24] Gibson v. Eller, 13 Ind. 128; Leavitt v. Fletcher, 92 Mass. (10 Allen) 121; Elliott v. Aikin, 45 N. H. 36; Warner v. Hitchins, 5 Barb. (N. Y.) 666; Post v. Vetter, 2 E. D. Smith (N. Y.), 248.

[25] Auworth v. Johnson, 5 Car. & P. 239, 24 Eng. C. L. 545. In the case of Ferguson v. ——, 2 Esp. 590, Lord Kenyon said that a tenant from year to year is bound to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises.

[26] Cheetham v. Hampson, 4 Durnf. & E. (4 T. R.) 318, 2 Rev. Rep. 397; Ferguson v. ——, 2 Esp. 590. In speaking, respecting Espinasse's Reports, on an occasion when the case of Wheeler v. Atkins, 5 Esp. N. P. C. 246, was relied upon by counsel, Lord Denman said: "I am tempted to remark, for the benefit of the profession, that Espinasse's Reports, in days nearer their own time, when their want of accuracy was better known than it is now, were never quoted without doubt and hesitation; and a special reason was often given as an apology for citing that particular case. Now they are often cited as if counsel thought them of equal authority with Lord Coke's Reports." Small v. Nairne, 13 Q. B. 840, 844, 66 Eng. C. L. 839, 844.

[27] Wise v. Metcalf, 10 Barn. & C. 299, 21 Eng. C. L. 123.

[28] Levey v. Dyess, 51 Miss. 501; United States v. Bostwick, 94 U. S. 53; bk. 24, L. ed. 65; Auworth v. Johnson, 5 Car. & P. 239, 24 Eng. C. L. 545; Bullock v. Dommett, 6 Durnf. & E. (6 T. R.) 650, 3 Rev. Rep. 300.

[29] Greenleaf v. Allen, 127 Mass. 248; Deane v. Cald-

not be personally liable under an implied covenant for rent after assignment of the premises and acceptance of the rent from the assignee.[30] In those cases where the lessor refuses to accept the assignee he may still hold the lessee for the rent, and will have an action in debt to recover the same;[31] but it has been said that a lessee remains personally liable on an express covenant, although the lease has been assigned in writing and rent actually received from the assignee, in those cases where the lessor has not accepted the surrender of the lessee and released the original lessor.[32]

Sec. 8. *Same—Real and Personal Covenants.*—We have already seen[33] that covenant in a lease are further distinguished as real and personal covenants; that is, as between such as run with the land to assignees, and are binding upon the assignees by privity of estate, and those which are purely personal obligations. We shall hereafter see[34] that in order to run with the land the performance or non-performance of the covenant must affect the nature, quality or value of the demised premises, independent of collateral circumstances, or must affect the mode of enjoyment of the premises;[35] and there must always be a privity of estate between the parties.[36] Thus a covenant in the lease that the lessor will not carry on the business for which the premises were leased within a radius of six miles, is a personal covenant and does not affect the right of a person to whom he may subsequently sell a portion of the premises;[37] and if the lessor covenant with a stranger to pay a certain rent, in consideration of the benefit to be derived under a third person, the covenant not being made with the person having the legal estate, cannot run with the land.[38]

Sec. 9. *Covenants Running With the Land—When Covenants Run With Land.*—Of the covenants in a lease some run with the land while others are binding only upon the person.[39] When the covenant is of a collateral nature to the land, it is a personal obligation and does not run with the land; if it is incapable in law of attaching to the estate, it will not bind or pass to assignees, even where they are expressly named.[40] All covenants relating to a subject-matter not *in esse*, such as for the erection of buildings upon the premises demised, are personal covenants and do not run with the land so as to bind the assignees, unless they are expressly named therein.[41] A covenant runs with the land when either the liability for its performance or the right to enforce it passes to the assignee of the land itself. In order that it may run with the land its performance or non-performance must affect the nature, quality or value of the property demised, independent of collateral circumstances, or it must affect the mode of enjoyment, and there must be a privity between the contracting parties.[42] It was said in Dorsey v. St. Louis, A. & T. H. R. Co.,[43]

well, 127 Mass. 242. In Greenleaf v. Allen, *supra*, the court say that "an assignment of the lease by the lessee cannot affect the liability of the lessee or his executor upon the covenant assigned." Citing Davitt v. Mudge, 78 Mass. (12 Gray) 23.

[30] Wave v. Reed, 88 Mass. (6 Allen) 369; Patten v. Deshon, 67 Mass. (1 Gray) 330; Walker v. Physick, 5 Pa. St. 193; Kimpton v. Walker, 9 Vt. 191; Auriol v. Mills, 4 Durnf. & E. (4 T. R.) 94, 2 Rev. Rep. 341.

[31] Auriol v. Mills, 4 Durnf. & E. (4 T. R.) 94, 2 Rev. Rep. 342.

[32] Franklin v. Maguire, 42 Pa. St. 82.

[33] See *ante*, § 2.

[34] See *post*, § 9.

[35] Norman v. Welles, 17 Wend. (N. Y.) 136. See Schwoerer v. Boylston Market Assn., 99 Mass. 285, 297; Hurd v. Curtis, 36 Mass. (19 Pick.) 459. It is said in Schwoerer v. Boylston Market Association, *supra*, that there can be no covenant running with the land where no land but only an incorporeal hereditament is granted. Citing Hurd v. Curtis, 36 Mass. (19 Pick.) 459.

[36] Bronson v. Coffin, 108 Mass. 175, 180; Hurd v. Curtis, 36 Mass. (19 Pick.) 459, 48 Mass. (9 Met.) 94; Webb v. Russell, 3 Dunf. & E. (3 T. R.) 393, 402, 1 Rev. Rep. 725, 730; Bailey v. Welles, 3 Wils. 29. In the case of Hurd v. Curtis, *supra*, several owners of mills drawing water from the same stream by means of the same dam entered into an indenture in which, for themselves, their heirs, administrators and assigns respectively, they covenanted with each other, and their respective heirs, administrators and assigns, that they would erect and use wheels of a certain construction and limited power in their respective mills. It was held that there was no privity of estate between the parties to the indenture, and consequently that the covenant did not run with the land and bind the grantee of one of the mills. A covenant to build a house on the land of a third person is a mere personal covenant; but a covenant to build a house or a new wall on the land demised will run with the land and bind the assignee on account of the privity of estate between the covenanting parties. Spencer's Case, 5 Co. 16.

[37] Herbert v. Dupaty, 42 La. An. 343, 7 South. Rep. 580.

[38] See Allen v. Wooley, 1 Blackf. (Ind.) 148; Gleen v. Canby, 24 Md. 127; Hurd v. Curtis, 36 Mass. (19 Pick.) 459.

[39] See 1 Sch. Pers. Prop. (2d ed.) § 29.

[40] See Aiken v. Albany R. Co., 26 Barb. (N. Y.) 289; Masury v. Southworth, 9 Ohio St. 340; Vyvyan v. Arthur, 1 Barn. & C. 410, 8 Eng. C. L. 175; Spencer's Case, 5 Co. 16; Keppell v. Bailey, 2 Myl. & R. 517.

[41] Hansen v. Meyer, 81 Ill. 321, 25 Am. Rep. 282; Tallman v. Coffin, 4 N. Y. 134; Masury v. Southworth, 9 Ohio St. 340; Bean v. Dickerson, 2 Humph. (Tenn.) 126; Sampson v. Easterly, 9 Barn. & C. 505, 17 Eng. C. L. 230; Grey v. Cuthbertson, 2 Chit. 482, 18 Eng. C. L. 747; Spencer's Case, 5 Co. 16; Congleton v. Pattison, 10 East. 138.

[42] Wiggin's Ferry Co. v. Ohio & M. R. Co., 89 Ill. , 10 Cent. L. J. 166; See Baldwin v. Walker, 21 Conn. 168; Plumleigh v. Cook, 13 Ill. 669; Patten v. Deshon, 67 Mass. (1 Gray) 325; Howland v. Coffin, 29 Mass. (12 Pick.) 125; Van Rensselaer v. Hays, 19 N. Y. 81; Nicholl v. New York & E. R. Co., 2 N. Y. 131; Van Rensselaer v. Smith, 27 Barb. (N. Y.) 151; Crawford v. Chapman, 17 Ohio, 449; Cook v. Brightley, 46 Pa. St. 445; Streaper v. Fisher, 1 Rawle (Pa.), 161; Scott v. Lunt's Admr., 32 U. S. (7 Pet.) 596, 606; bk. 8, L. ed. 797, 800; Vyvyan v. Arthur, 1 Barn. & C. 410, 8 Eng. C. L. 175; Spencer's Case, 5 Co. 16.

[43] 58 Ill. 67.

that a "covenant is said to run with the land when either the liability for its performance or the right to enforce it, passes to the land itself. A covenant is said to run with the reversion when the liability to perform it or the right to enforce it passes to the assignee of the reversion." It has been said that whether a covenant will or will not run with the land, does not, however, so much depend on whether it is to be performed on the land itself, as whether it tends directly or necessarily to enhance its value, or render it more beneficial and convenient to those by whom it is owned or occupied.[44]

Sec. 10. *Same—Covenants Running with Part of Land.*—The common law doctrine that an entire contract could not be apportioned was limited to personal contracts and covenants and did not extend to such contracts and covenants as run with the land;[45] consequently, wherever a covenant running with the land is divisible in its nature, if the entire interest to the part or parcel of the premises is demised to distinct individuals, the covenant attaches *pro tanto* to the parcels assigned and to the part remaining,[46] the holder of each part being answerable for his proportion of any charge which is a common burden upon the land, and exclusively liable for any breach of the covenant which relates to his part alone, covenant laying both by and against each.[47] In the case of Patten v. Deshon,[48] the court say that the assignee of all a lessee's interest in and to the lease may recover rent subsequently accruing, of one to whom such lessee has previously leased a portion of the demised premises for the whole of the term, and who occupies such portion accordingly, in an action of contract, without setting forth in his declaration the assignment from the original lessee to the plaintiff. And the defendant in such action is estopped to deny the estate of the original lessor in the premises. The reason for this is because the assignee of the lease becomes privity in estate with the original lessor, and is bound by the covenants of the original lessee so that an action will lie against him by the original lessor.[49] Consequently covenant lies against the assignee of part of the land demised, and the damages are to be proportioned, on the ground that the assignee is chargeable, by reason of privity of estate.[50] But to render one liable in covenant as assignee he must take an assignment of the whole or a part of the premises for the entire term.[51] The court say in the case of Patten v. Deshon,[52] that this is one of the cases in which the exception proves the rule. The assignee, being liable only in privity of estate, is liable only for breaches accruing whilst he holds the estate as assignee; not for breaches, which occurred before he became assignee;[53] nor after he has transferred his whole interest by assignment,[54] even though the assignee of the assignee be a woman and a prisoner or a beggar or a pauper.[55]

Sec. 11. *Same— What Covenants run with the Land.*—The usual covenants running with the land are for quiet enjoyment, whether expressed or implied;[56] to convey;[57] to cultivate the land in a particular manner;[58] to deliver up the premises in good condition;[59] to do act elsewhere does not run against the land;[60] to insure premises devised where the money realized in case of loss is to be spent in rebuilding or repairing;[61] to maintain a

[44] Masury v. Southworth, 9 Ohio St. 340.

[45] Van Rensselaer v. Bradley, 3 Den. (N. Y.) 135, 141, 45 Am. Dec. 451, 453. See Taylor v. Heideron, 46 Barb. (N. Y.) 452; Van Rensselaer v. Smith, 27 Barb. (N. Y.) 154; Astor v. Miller, 2 Paige Ch. (N. Y.) 68, 78; Ingersoll v. Sergeant, 1 Whart. (Pa.) 337; Pollard v. Shaaffer, 1 U. S. (1 Dal.) 210; bk. 1, L. ed. 104; Merceron v. Dowson, 5 Barn. & C. 479, 11 Eng. C. L. 549; Stevenson v. Lombard, 2 East, 575; 6 Rev. Rep. 511; Wollaston v. Hakewill, 3 Man. & Gr. 297, 42 Eng. C. L. 161; Hodglins v. Robson, 1 Vent. 276.

[46] Van Rensselaer v. Bradley, 3 Den. (N. Y.) 135, 45 Am. Dec. 451. See Harris v. Frank, 52 Miss. 158; Deaminville v. Mann, 32 N. Y. 204; Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643; Astor v. Miller, 2 Paige Ch. (N. Y.) 68; Van Horne v. Crain, 1 Paige Ch. (N. Y.) 455; St. Clair v. Williams, 7 Ohio, pt. II. 110; Gammon v. Vernon, 2 Lev. 231.

[47] Patten v. Deshon, 67 Mass. (1 Gray) 325; Twynman v. Pickard, 2 Barn. & Ald. 105.

[48] 67 Mass. (1 Gray) 325.

[49] Patten v. Deshon, 67 Mass. (1 Gray) 325, 329. See Palmer v. Edwards, 1 Doug. 187; Taylor v. Needham, 2 Taunt. 278, 11 Rev. Rep. 572.

[50] Patten v. Deshon, 67 Mass. (1 Gray) 325, 329; Stevenson v. Lombard, 2 East. 755, 6 Rev. Rep. 511.

[51] Patten v. Deshon, 67 Mass. (1 Gray) 325, 329; Bedford v. Terhune, 30 N. Y. 453, 460; Kain v. Hoxie, 2 Hilt. (N. Y.) 311, 316; Bagley v. Freeman, 1 Hilt. (N. Y.) 196; Holford v. Hatch, 1 Doug. 183.

[52] 67 Mass. (1 Gray), 325, 327.

[53] St. Saviours v. Smith, 3 Burr. 1271.

[54] Eaton v. Jacques, 2 Doug. 461 and note.

[55] Torry v. Wallis, 57 Mass. (3 Cush.) 442; Daniels v. Richardson, 39 Mass. (22 Pick.) 565; Howland v. Coffin, 26 Mass. (9 Pick.) 52, 29 Mass. (12 Pick.) 126; Taylor v. Shum, 1 Bos. & P. 21, 4 Rev. Rep. 759; Pitcher v. Tovey, 1 Salk. 81; Lekeux v. Nash, 2 Stra. 1221.

[56] Shelton v. Codman, 57 Mass. (3 Cush.) 318; Hunt v. Amidon, 4 Hill (N. Y.), 345; Suydam v. Jones, 10 Wend. (N. Y.) 180; Markland v. Crump, 1 Dev. & B. (N. C.) L. 945; Campbell v. Lewis, 3 Barn. & Ald. 392, 8 Taunt. 715, 5 Eng. C. L. 230; William v. Burrell, 1 C. B. (Man. S. & S.) 402, 433, 50 Eng. C. L. 401, 432.

[57] Van Horne v. Crain, 1 Paige Ch. (N. Y.) 455. See, Hagar v. Buck, 44 Vt. 289, 8 Am. Rep. 368, 370; Jackson ex d. Weidman v. Hubble, 1 Cow. (N. Y.) 613; Jackson ex d. Stevens v. Stevens, 13 John. (N. Y.) 316.

[58] Gordon v. George, 12 Ind. 408; Cockson v. Cock, Cro. Jac. 125.

[59] See Myers v. Burns, 33 Barb. (N. Y.) 401; Demarest v. Willard, 8 Cow. (N. Y.) 206; Shelby v. Hearne, 6 Yerg. (Tenn.) 512; Pollard v. Shaaffer, 1 U. S. (1 Dal.) 210, bk. 1, L. ed. 104; Deane of Windsor's Case, 5 Co. 54; Spencer's Case, 5 Co. 16; Sargent v. Smith, 78 Mass. (12 Gray), 426, and denied in a *dictum* of Baron Parke in Doe v. Seaton, 5 Cromp. M. & R. 730.

[60] Spencer's Case, 5 Co. 16; Mayho v. Buckhurst, Cro. Jac. 433; Keppell v. Bailey, 2 Myl. & K. 517.

[61] Masury v. Southworth, 9 Ohio St. 340. See, Thomas v. Von Kapff, 6 Gill. & J. (Md.) 372; Doe

partition fence;[62] to pay for buildings erected is a covenant that passes to the assignee of the lessee, but does not bind the assignee of the reversion;[63] to pay rent;[64] to renew lease;[65] to repair;[66] to pay taxes;[67] to rebuild;[68] to reside on the premises;[69] to warrant;[70] not to carry on a particular trade on the premises;[71] not to employ any other place or site in the same stream for a mill of the specified kind, in a mill lessee;[72] not to sell wood or timber from the demised premises;[73] and all the implied covenants run with the land.[74]

Sec. 12. *Same—Rights of Assignee Under.*—A covenant is said to run with the land, so as to bind an assignee to its performance, where it relates to the management or conduct of the land, is beneficial to the estate, or its performance is a part of the original consideration on which the lease was granted;[75] but a covenant in a lease which the covenantee cannot, after his assignment, take advantage of, and which is beneficial to the assignee as such, will go with the estate assigned. If this were not the law, the tenant would hold the estate discharged from the performance of one of the conditions on which it was granted to him.[76] Thus a covenant to insure in a lease is one that is beneficial and runs with the land,[77] and on the assignment of the reversion pass to the assignee. The original covenantee could not avail himself of this covenant after assignment; does not sustain any loss by the destruction of the buildings and therefore has no interest to have them insured.[78] The covenant of the lessee to pay rent is one that runs with the land.[79] The assignee of the lessor may have debt against such lessee or his assignee, where the letting has been by an indenture of lease,[80]

d. Fowler v. Peck, 1 Barn. & Adol. 428, 20 Eng. C. L. 546; Vernon v. Smith, 5 Barn. & Ald. 1, 7 Eng. C. L. 13.

[62] Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550. See, Spencer's Case, 5 Co. 16; Bally v. Wells, 3 Wils. 25.

[63] Hunt v. Danforth, 2 Curt. C. C. 592. See, Aikin v. Albany R. Co., 26 Barb. (N. Y.) 289; Vernon v. Smith, 5 Barn. & Ald. 1, 7 Eng. C. L. 13; Vyvyan v. Arthur, 1 Barn. & C. 410, 8 Eng. C. L. 175. The general principle applicable to cases of this class is laid down by Best, J., in Vyvyan v. Arthur, *supra*, which was a case where the lessee of part of an estate covenanted with the lessor to do a service at a mill belonging to the lessor upon another part of the estate, in which the lessee bound his assigns, as follows: "If the performance of the covenant be beneficial to the reversioner in respect of the lessor's demand, and to no other person, his assignee may sue upon it: but if it be beneficial to the lessor without regard to his continuing owner of the estate, it is a mere collateral covenant, upon which the assignee cannot sue."

[64] Howland v. Coffin, 29 Mass. (12 Pick.) 125; See Maine v. Feathers, 21 Barb. (N. Y.) 646; Jacques v. Short, 20 Barb. (N. Y.) 269; Graves v. Porter, 11 Barb. (N. Y.) 592; Demarest v. Willard, 8 Cow. (N. Y.) 206; Noonan v. Orton, 4 Wis. 342; Hunt v. Danforth, 2 Curt. C. C. 392; Hurst v. Rodney, 1 Wash. C. C. 375.

[65] Renond v. Daskam, 34 Conn. 512; Blackmore v. Broadman, 28 Mo. 420; Piggot v. Mason, 1 Paige Ch. (N. Y.) 412. Where the lease provided for the lessee enjoying the estate for a certain term, with a right to hold it as much longer as he should choose after the expiration of the term, at the same rate, no definite time being prescribed, it was held not to be a covenant running with reversion so as to bind the assignee of the lessor; and the lessor having died during the term, the lessee having chosen to hold beyond the term, his tenancy became one from year to year, determinable by notice from the lessee or the owner of the reversion. West Transportation Co. v. Lansing, 49 N. Y. 499.

[66] Gordon v. George, 12 Ind. 408; Taffe v. Harteau, 56 N. Y. 398, 15 Am. Rep. 328; Demarest v. Willard, 8 Cow. (N. Y.) 206; Pollard v. Shaaffer, 1 U. S. (1 Dal.) 210, bk. 1, L. ed. 104; Deane of Windsor's Case, 5 Co. 24; Spencer's Case, 5 Co. 16.

[67] Martin v. Baker, 2 Blackf. (Ind.) 232; Astor v. Miller, 2 Paige Ch. (N. Y.) 68; Host v. Kerney, 1 Sandf. (N. Y.) 105, 2 N. Y. 394. It is said in Astor v. Miller, *supra*, that where the covenant is contained in a lease on the part of the lessee, to pay all taxes and assessments which be imposed on the premises by authority derived from the United States, the State of New York, or from the corporation of the city of New York, and an improvement was made by the corporation of New York in the opening of Lafayette Place, which took part of the leasehold premises, it was held that the lessee was chargeable with the amount of the assessment upon the interest of the lessor in the premises.

[68] Doe d. Fowler v. Peck, 1 Barn. & Adol. 428, 20 Eng. C. L. 546; Vernon v. Smith, 5 Barn. & Ald. 1, 7 Eng. C. L. 13.

[69] Van Ransselaer v. Read, 26 (N. Y.) 558, 576; Doe d. Lockwood v. Clarke, 8 East, 185, 9 Rev. Rep. 402; Tatem v. Chaplan, 2 H. Bl. 133, 3 Rev. Rep. 360; See Williams v. Earle, L. R. 3 Q. B. 739, 750, 37 L. J. Q. B. 231; Fleetwood v. Hull, 23 Q. B. Div. 35, 37, 58 L. J. Q. B. 341.

[70] Van Horne v. Crain, 1 Paige Ch. (N. Y.) 455.

[71] St. Andrew's Church's Appeal, 67 Pa. St. 512; Tatem v. Chaplin, 2 H. Bl. 133, 3 Rev. Rep. 360. A covenant not to exercise a particular trade on other premises of the lessor, however, does not bind a grantee of the latter for want of privity to estate. Taylor v. Owen, 2 Blackf. (Ind.) 301.

[72] Norman v. Wells, 17 Wend. (N. Y.) 136.

[73] Verplanck v. Wright, 23 Wend. (N. Y.) 506.

[74] See Fletcher v. McFarlane, 12 Mass. 43; Harvey v. McGraw, 44 Tex. 412; Smith v. North, L. R. 7 Ex. 242.

[75] Laffan v. Naglee, 9 Cal. 662, 70 Am. Dec. 678; Gordan v. George, 12 Ind. 408; Morse v. Aldrich, 36 Mass. (18 Pick.) 749; Blackmore v. Broadman, 28 Mo. 420; Van Rensselaer v. Smith, 27 Barb. (N. Y.) 104, 106; De Forrest v. Byene, 1 Hilt. (N. Y.) 43; Jackson ex d. Benton v. Vlaughhead, 2 Johnn. (N. Y.) 75; Piggot v. Mason, 1 Paige Ch. (N. Y.) 412; Norman v. Wells, 17 Wend. (N. Y.) 136; Wolliscroft v. Norton, 15 Wis. 204; Vernon v. Smith, 5 Barn. & Ald. 1, 7 Eng. C. L. 13.

[76] Vernon v. Smith, 5 Barn. & Ald. 1, 7 Eng. C. L. 13, 17.

[77] See, *ante*, Sec. 11.

[78] Vernon v. Smith, 5 Barn. & Ald. 1, 7 Eng. C. L. 13. See Saddler's Co. v. Badcock, 2 Atk. 577.

[79] See *ante*, § 11.

[80] Patten v. Deshon, 67 Mass. (1 Gray) 325, 327;

where the assignment is of the whole or a portion of the premises for the entire term; but if the assignment is not for the entire term it will be regarded as simply a subleasing and such sublessee or his assignee, will not be liable to the original lessor.[81] This is said to be one of the cases in which the exception proves the rule. The assignee, being liable only in privity of estate, is liable only for breach occurring whilst he holds the estate as assignee, not for breach which occurred before he became assignee,[82] nor after he has transferred his whole interest by assignment,[83] even though the assignee of the assignee be a woman and a prisoner, or even a beggar, or a pauper.[84] The lessor is also liable to the assignee of the lease on his covenants running with the land, among which are covenant for quiet enjoyment,[85] for further assurances,[86] to renew lease,[87] to repair the premises,[88] to allow the lessee liberty to purchase the estate and the like.

Sec. 13. *Same—When Assignee Bound.*—We have already seen[89] that covenants collateral to the land, and incapable in the law of attaching to the estate demised, will not pass to or bind assignee, even where they are expressly named in the lease.[90] An important distinction in respect to covenants running with the land is to be observed between those covenants which bind assignees, as well as operate in their favor, without their being named, and such as require assignees to be named in order to be binding upon them. This distinction is based upon the fact that the subject-matter of the covenant is or is not *in esse*, at the time of the demise. If the covenant relates to a thing *in esse*, such as to repair a building or maintain fences, it will bind the assignee, whether named or not; but where the subject-matter of the covenant is not *in esse*, such as to build a new house or a new fence upon the demised premises, it is personal covenant not running with the land, and the assignee is not bound,[91] unless expressly named in the lease.[92] This distinction gives rise to questions bordering closely on the line between real and personal covenants, which does not seem to be very clearly defined, and the questions raised, for that reason, rest largely in the discretion of the court, and the intention of the parties as gathered from the lease.

JAMES M. KERR.

New York.

Howland v. Coffin, 29 Mass. (12 Pick.) 125; Demarest v. Willard, 8 Cow. (N. Y.) 206.

[81] Patten v. Deshon, 67 Mass. (1 Gray) 329; Bedford v. Terhune, 30 (N. Y.) 460; Norman v. Wells, 17 Wend. (N. Y.) 136.

[82] Patten v. Deshon, 67 Mass. (1 Gray) 325, 329; St. Saviours v. Smith, 2 Burr. 1271.

[83] Patten v. Deshon, 67 Mass. (1 Gray) 325, 329; Eaton v. Jacques, 2 Doug. 461.

[84] Patten v. Deshon, 67 Mass. (1 Gray), 325, 339. See Torry v. Wallis, 57 Mass. (3 Cush.) 442; Daniels v. Richardson, 39 Mass. (22 Pick.) 565; Howland v. Coffin, 26 Mass. (9 Pick.) 52, 29 Mass. (12 Pick.) 126.

[85] Waldo v. Hall, 14 Mass. 486.

[86] King v. Jones, 5 Taunt. 418, 1 Eng. C. L. 219.

[87] Vernon v. Smith, 5 Barn. & Ald. 1, 7 Eng. C. L. 13; Spencer's Case, 1 Moo. 159.

[88] Laffan v. Neglee, 9 Cal. 662, 70 Am. Dec. 678; Napier v. Darlington, 70 Pa. St. 64; Kerr v. Day, 14 Pa. St. 112.

[89] See *ante*, Sec. 9.

[90] See Aiken v. Albany R. Co., 26 Barb. (N. Y.) 289; Masury v. Southworth, 9 Ohio St. 340; Vyvyan v. Arthur, 1 Barn. & C. 410, 8 Eng. C. L. 175; Spencer's Case, 5 Co. 16; Keppell v. Bailey, 2 Myl. & R. 517.

[91] See Hansen v. Myer, 81 Ill. 321, 25 Am. Rep. 282; Tallman v. Coffin, 4 N. Y. 134, 136; Thompson v. Rose, 8 Cow. (N. Y.) 266, 269; Masury v. Southworth, 9 Ohio St. 340; Bean v. Dickerson, 2 Humph. (Tenn.) 126; Sampson v. Easterly, 9 Barn. & C. 505, 17 Eng. C. L. 230; Grey v. Cuthbertson, 2 Chit. 482, 18 Eng. C. L. 747; Spencer's Case, 5 Co. 16; Congleton v. Pattison, 10 East. 138. In Hanson v. Meyer, *supra*, the lessor covenanted to put in certain fixtures consisting of counters and shelving, and the court held that where a written lease does not in terms bind the lessor's assigns, the lessee cannot maintain an action against a grantee of the premises from the lessor, for breach of a covenant on the part of the lessor to put in fixtures.

[92] Spencer's Case, 5 Co. 16.

[93] Congleton v. Pattison, 10 East. 138.

COUNTY TREASURER—LIABILITY FOR MONEY DEPOSITED IN BANK.

FAIRCHILD V. HEDGES.

Supreme Court of Washington, February 27, 1896.

A county treasurer is liable for money deposited by him in a bank which afterwards becomes insolvent, though no negligence is charged against him, and though the county has not provided a safe place in which to deposit said money.

GORDON, J.: The appellant was, for four years prior to January, 1895, the qualified and acting treasurer of Pierce county, and the respondent Hedges succeeded him as such treasurer. The respondents, Holmes, Rogers and Bartholomew constitute the board of commissioners, and the respondent Gloyd is county auditor of said county. From the record it appears that, during his terms of office as such treasurer, the appellant deposited sums of money coming into his hands as such treasurer in various banks, some of which banks thereafter failed, and this proceeding was instituted by the appellant to compel the respondents to accept, in settlement of appellant's account as treasurer, certain receivers' certificates of insolvent banks. The petition asserts that the deposits were made with the knowledge of the respondents, and in accordance with his business custom; that neither the county of Pierce nor the board of county commissioners of said county provided him with any safe place for keeping the funds; that the safest and surest manner of keeping them was to make a deposit of them in reliable banks of good standing in the community; that the several banks selected by him as places of deposit were of high standing and repute, etc. The lower court sustained respondent's motion to quash the affidavit upon which the application

for a writ of mandate was based, and, the relator electing to stand thereon, judgment of dismissal was rendered, from which he appeals. For a better understanding of the nature of the controversy, we quote the following from the opening statement contained in appellant's brief, viz: "The question at issue in this action is narrowed, by agreement of parties, to the consideration of the one question to-wit: 'Is the county treasurer of Pierce county, Wash., liable personally or upon his bond for money deposited in a bank which afterwards becomes insolvent, in a case where there is no charge of negligence or want of care in any degree against the treasurer, and where it is further admitted that the county has not provided a suitable and safe place in which to deposit the amount of money which may come into the treasurer's hands?'"

Appellant's contentions are: (1) That the treasurer is not the debtor or insurer of the money that comes into his hands, but only the bailee for hire, or trustee of an express trust, who was only responsible for the exercise of good faith and reasonable skill and diligence in the discharge of his trust; and (2) that there is no statutory or constitutional inhibition against depositing such funds in the banks for safe-keeping; that, under the circumstances, it was his duty to so deposit said funds; and that he would be liable for negligence only in selecting such depositories. Section 5, art. 11, of the constitution of the State requires that "the legislature shall provide for the strict accountability of the said officers (referring to the county officers) for the fees which may be collected, and for all public moneys which may be paid to them or officially come into their possession." The statute makes it the duty of the county treasurer to receive all moneys due and accruing to the county, and disburse the same in the manner provided by law, and requires him, before entering upon the duties of his office, to give a bond to the county, conditioned, among other things, that "all moneys received by him for the use of the county shall be paid as the commissioners shall from time to time direct, except where special provision is made by law for the payment of such moneys, by order of any court, or otherwise, and for the faithful discharge of his duties." 1 Hill's Code, § 211. An examination of all the authorities has satisfied us that, while such officers are bailees, "they are special bailees, subject to special obligations," and that "it is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility." U. S. v. Thomas, 15 Wall. 337. "His liability is to be measured by his bond, and that binds him to pay the money." Boyden v. U. S., 13 Wall. 17.

On this branch of the case, this court, in Marx v. Parker, 9 Wash. 473, 37 Pac. Rep. 675, after reviewing the authorities bearing upon the proposition, said: "It seems to us that every one of the earlier cases cited, where the expression was used that such and such an officer was not a bailee, or a mere bailee, or was a debtor, must be regarded from the standpoint of the court and the particular case. They were, one and all, cases where suit had been brought upon the bond of the officer, and he was attempting to excuse his default because he had lost the money by robbery, or from some other cause over which he claimed to have no control. But in every such case it was held that his liability was absolute, and the true reason, under U. S. v. Thomas, *supra*, must be, not that he was any the less a bailee, but that the statute imposed upon him a measure of duty larger than that found in the common law." We take it that it is fundamental in the law of bailments that the amount of care which the bailee is required to take of the goods or property intrusted to him may be expressly fixed by the contract, and that it is only in the absence of an express agreement that the law presumes it to have been the intention of the parties that a bailee for hire (other than common carriers and the like) is required to exercise only ordinary care, prudence, and caution in the custody and control of the property with which he is intrusted. In the well-considered case of Board v. Jewell, 44 Minn. 427 46 N. W. Rep. 914, the court say: "There is some conflict in the decisions as to the responsibility of public officers and their sureties for the loss of public moneys without negligence or fault on the part of the officers. While in some cases the rule of responsibility of bailees for hire has been applied, exonerating officers who have been found guiltless of negligence, this measure of responsibility is not generally accepted. The great weight of authority in this country will sustain the general propositions, with respect to the liability of such officers and their sureties for the loss of public moneys, that where the statute, in direct terms or from its general tenor, imposes the duty to pay over public moneys received and held as such, and no condition limiting that obligation is discoverable in the statute, the obligation thus imposed upon and assumed by the officer will be deemed to be absolute, and the plea that the money has been stolen or lost without his fault does not constitute a defense to an action for its recovery; that the rule of the responsibility of bailees for hire is not applicable in such cases; that, where the condition of a bond is that the officer will faithfully discharge the duties of the office, and where the statute, as before stated, imposes the duty of payment or accountability for the money, without condition, the obligors in the bond are subject to the same high degree of responsibility; and that the reasons upon which these propositions rest are to be found both in the unqualified terms of the contract and in considerations of public policy." In Wilson v. Wichita Co. (Tex. Sup.), 4 S. W. Rep. 68, the court say: "It is too well settled to require discussion that an officer who is custodian of public money does not occupy the relation of a mere bailee for hire, who is respon-

sible only for such care of the money as a prudent man would take of his own. He is bound to account for and pay over the public money." In Rose v. Douglass Tp. (Kan. Sup.), 34 Pac. Rep. 1046, the court say: "By accepting the office of township treasurer, McNabb assumed the duty of receiving and safely keeping the money of the township, and paying it out according to law. He or his sureties are bound to make good any deficiency which might occur in the funds which came under his charge, whether they were lost in the bank or otherwise." In Griffin v. Board (Miss.), 15 South. Rep. 107, it is said: "The idea that the tax collector may make a general deposit of public money in bank, and thereby absolve himself from liability to pay over as he is by law required to do, is so utterly unreasonable as to need no combating. Like all others depositing funds in bank, the tax collector took the risks involved in so doing. The State looks to its officer, and the officer must look to his unreliable or unfaithful banker." In Nason v. Directors, etc. (Pa. Sup.), 17 Atl. Rep. 616, the court, speaking through Chief Justice Paxton, say: "The failure of the bank in which the defendant deposited the money is no defense. A receiver of public money, who has given bond for its safe-keeping, is not discharged from liability therefor by the failure of his banker." In Ward v. School Dist., 10 Neb. 293, 4 N. W. Rep. 1001, the court say: "It was Ward's duty, under the law, to keep the money securely. * * * The money was within his control, placed there by force of the statute; and if he saw fit to intrust it to the care of another, he did so at his peril." In District Tp. v. Morton, 37 Iowa, 550, the defendant, as township treasurer, had given a bond conditioned (pursuant to the statute that, "if the said M, as treasurer, shall faithfully and impartially discharge the duties of said office as required by law, then this obligation shall be null," etc. It was held that the defendant was absolutely liable for all moneys coming into his hands, and that he could not plead, as a defense, that the money was, without his fault or negligence, stolen from him, the court saying: "These rules are applicable to all contracts, and the public interests demand that, at this day, when public funds in such vast amounts are committed to the custody of such an immense number of officers, they should not be relaxed when applied to official bonds. A denial of their application in such cases would serve as an invitation to delinquencies which are already so frequent as to cause alarm." In Com. v. Comly, 3 Pa. St. 372, Mr. Chief Justice Gibson says: "The keepers of the public moneys, or their sponsors, are to be held strictly to the contract; for, if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant." In addition to the foregoing, the following cases are to the same effect: Halbert v. State, 22 Ind. 125; State v. Moore, 74 Mo. 413; State v. Harper, 6 Ohio St. 607; Inhabitants of New Providence v. McEachron, 33 N. J. Law, 339; State v. Clarke, 73 N. C. 255; Com'rs v. Lineberger, 3 Mont. 231; Thompson v. Board, 30 Ill. 99; McKinney v. Robinson (Tex. Sup.), 19 S. W. Rep. 699; Tillinghast v. Merrill (Sup.), 28 N. Y. Supp. 1089; Baily v. Com. (Pa. Sup.), 10 Atl. Rep. 764.

We think that, by the great weight of authority upon the question, an officer, such as a county treasurer, under our law, is held to the rule of strict accountability. As is said in Thompson v. Board, *supra:* "They know well, on assuming their positions, the hazards to which they are exposed, and they voluntarily assume the risk, and are paid for so doing." And if "it appears to be a harsh measure of justice to hold that the treasurer and his sureties are liable, on his official bond, for the money deposited under the circumstances disclosed in the affidavit of defense, and subsequently lost without his fault or negligence, it is impossible to reach any other conclusion without ignoring the authority of well-considered cases." Baily v. Com., *supra.* We have examined all the cases cited in the able brief of the appellant bearing upon this proposition, but are unable to perceive that they are in conflict with the doctrine above laid down. A single case need only be referred to—*In re* Law's Estate (Pa. Sup.), 22 Atl. Rep. 831. It was there held that the guardian, who deposited the moneys of his ward in a bank believed by him to be solvent, was not liable for the funds so deposited upon the failure of the bank. We think that the distinction is very clear between the liability and duty of one receiving moneys as a guardian, for the benefit of a private individual, and the liability imposed by statute and by express undertaking upon a public officer as in the case at bar. As to the former, "he is merely the trustee or agent of the private parties interested in the money, and no greater or higher responsibility should be imposed upon him than would be imposed upon any agent or trustee." People v. Faulkner, 107 N. Y. 488, 14 N. E. Rep. 415. The loss in this case was not occasioned by the act of God or a public enemy, and we are not called upon to decide whether, under the circumstances attending such a loss, the officer would be exempt from liability. This conclusion necessarily leads to an affirmance of the judgment entered below, and renders it unnecessary to decide whether a county treasurer may lawfully deposit the funds of his county in a bank or banks. Affirmed.

NOTE.—The decision of the court in the principal case is undoubtedly sustained by the weight of authority. It may be said that the general rule upon this subject is to the effect that public officers who are intrusted with public funds and required to give bonds for the faithful discharge of their official duties are not mere bailees of the money to be exonerated by the exercise of ordinary care and diligence; that their liability is fixed by their bond, and that the fact that money is stolen from them or is lost through failure of banks in which it is deposited, without any fault or negligence on their part does not release

them from liability upon their official bonds. A good case illustrating this proposition is State v. Nevin, 21 Cent. L. J. 309, where it was held that the sureties in the bond of a public treasurer who is required by law to keep the public moneys safely, are liable for moneys stolen from such treasurer without his fault or negligence. Appended to this case will be found a note in which the older authorities on the subject are collected. Still it is true that some respectable courts have held to the contrary, but the result in such cases may be due in part to the phraseology of the statute governing the officer. The leading case maintaining the view that the officer should be viewed in the light of a mere bailee for hire, responsible only for negligence is Cumberland County v. Pennell, 9 Cent. L. J. 305, decided by the Supreme Court of Maine. The court in that case say that, "in some of the States, however, by force of their statutes, treasurers and collectors became responsible as debtors for the money which comes into their possession by virtue of their office." A statement so broad is hardly warranted. There are still other cases as the dissenting opinion of Hoyt, C. J., in the principal case, shows, which antagonize the doctrine of the principal case. See Supervisors v. Dorr, 25 Wend. 440; York Co. v. Watson, 40 Amer. Rep. 675; Wilson v. People (Colo.), 34 Pac. Rep. 944; State v. McFetridge (Wis.), 54 N. W. Rep. 1; State v. Houston, 56 Amer. Rep. 59. There are still other cases which though not deciding the exact question here presented in principle sustain the contention of those who argue against the relation of debtor and creditor as between a county treasurer and the people. The dissenting judge in the principal case thinks that it is a strained construction of the statute governing the liability of public officials and the obligation he has assumed which makes him the guarantor of the funds intrusted to him. If, he says, it is a part of his duty to produce the money, regardless of contingencies, he should be allowed to do what he pleases with it until called upon so to produce it. "It is unfair and illogical" the eminent jurist concludes, "to say that he is personally responsible for the safe-keeping of the money, and at the same time must make only such disposition of it as may be prescribed by the one for whom he holds it. The cases which have held public officers to be guarantors of the safety of funds coming into their hands are mostly from federal courts, and have been largely induced by the peculiar language of the federal statutes. To hold that the officer cannot make such disposition of the funds as he thinks proper, and yet must be responsible for its safe-keeping, is so illogical and fraught with such hardship upon the officer that I am not willing to follow the cases which have so held. If the relation of debtor and creditor was created by the receipt of the money by the officer, so that he could dispose of it as he pleased, there would be no reason in holding him responsible for its safe-keeping; but this would be against public policy. In my opinion all that our statute requires of a county treasurer is either that he should produce the money coming into his hands when required by law, or that he should show that he had exercised the care required of a trustee for hire and that it had been lost without fault on his part. Such has been the holding of the courts under statutes of the same substance as ours, where the bond required was to the same effect."

JETSAM AND FLOTSAM.

ACQUIRING TITLE TO PROPERTY THROUGH CRIME.

The people who commit suicide in England from prudential motives—to provide for their families or to "do the insurance company" like the keen Yorkshireman—are not numerous, but in the land of the almighty dollar suicides deliberately planned are apparently so frequent as to make the title of the suicide-assured a matter of some moment. The offices are clearly at his mercy, and a learned American judge recognizing this fact has lately held that there is in every policy of life insurance an implied warranty not to commit suicide while sane. Ritter v. Mutual Life Insurance Co., 30 Am. L. Rev. (Jan.), 154. This fiction of law the learned judge rests on the ground that the insurance company bases its calculations on lives running out to their natural termination, that the assured knows this and contracts on that basis; but apart from the objectionableness of implying warranties, surely the natural comment on this is that suicide can be reckoned with like the gallows or drunkenness or any other factor of life assurance risk. In England an implied warranty is not wanted, because the policy of our law disentitles a man to reap the benefit of his own criminal act—which felo-de-se is. In America this is not so. The better opinion seems to be that title may be acquired through a crime (Carpenter's Estate, 32 Atl. Rep. 637, 30 Am. L. Rev. [Jan., 130], even though that crime is parricide. Compared with this our English highwayman claiming an account against his fellow is quite a modest demand. The problem as it presents itself to American lawyers is how a crime can defeat the operation of statutes like the descent act or the wills act, and no doubt there is a difficulty where an heir murders his ancestor, or a legatee his testator, in reading into the descent act or the will a clause of disinheritance or revocation. English law does not attempt to do so, but creates, on grounds of public policy, a personal disability in the criminal to profit by his crime. This principle of public policy does not seem to be generally accepted in America, however it may be in the civil law or English law. The American view is that the law has assigned to each crime its proper punishment, and the courts have no right to add a fresh penalty in the form of forfeiture. —*London Law Quarterly Review.*

CORRESPONDENCE.

QUERY.

To the Editor of the Central Law Journal:

A owns a block of ground in a city which has an ordinance requiring a majority of the lot owners, fronting in said block, to sign a petition to allow a retail liquor license to be issued. A leases for ten years, to B, 50x150 feet on one of the corners of the block. The lease is general in its terms, save and except inhibitions against use of any business provided by law, and has this further clause in the lease: "The sale of retail liquors is not objectionable." B improved the property and put a saloon in the corner, other parts of the leased premises being improved in other ways. A conveyed all of the block to C during the term of B's lease. B's lease was recorded. B's license from the city has expired. He desires to re-

new the same, and has demanded of C to sign this application. C has refused. Can B, by injunction or otherwise, compel C to sign the petition? If so, for how much of the land now owned by C can he be compelled to sign for? Please cite authorities, if any.

H. J.

BOOKS RECEIVED.

The American State Reports, Containing the Cases of General Value and Authority Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated by A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. XLVII. San Francisco: Bancroft-Whitney Company, Law Publisher and Law Bookseller. 1896.

HUMORS OF THE LAW.

Lawyer—What is your gross income?

Witness—I have no gross income.

Lawyer—No income at all?

Witness—No gross income. I have a net income. I'm in the fish business.

"What was the most confusing case you ever had?" asked the doctor of his lawyer. "Case o' champagne," returned the lawyer. "I hadn't got half through it before I was all muddled up."

Hoax—There was a fellow in court to day charged with stealing a horse and leaving his bicycle in place of it.

Joax—What did they do? Convict him.

Hoax—No; the jurymen were all cyclers and they recommended that the prisoner be sent to an insane asylum.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE—Designation of Beneficiary.—Where an accident policy designates the beneficiary by name, and states that she is the daughter of insured, and it was shown that insured had a daughter bearing that name, parol evidence was inadmissible to show that the wife of insured, bearing the same name, was beneficiary.—STANDARD LIFE & ACCIDENT INS. CO. v. TAYLOR, Tex., 34 S. W. Rep. 781.

2. ADMINISTRATION — Administrator's Sale—Notice.—Under Rev. St. 1889, § 147, providing that, when a petition is filed for the sale of a decedent's land, notice must be given to the heirs, by publication for four weeks in some newspaper, or by handbills posted in public places, an order of sale not on an annual accounting, made without such notice, and on the same day that the petition was filed, is void.—HUTCHISON v. SHELLEY, Mo., 34 S. W. Rep. 838.

3. ADMINISTRATION — Partnership Estate — Liability for Interest.—Under Rev. St. 1889, § 224, providing that if executors and administrators lend deceased's money, or "use it for their own private purposes, they shall pay interest thereon to the estate," where a surviving partner administers the partnership estate, and during the first year uses the money of the estate in his own business, the probate court has no discretion to relieve him from payment of the interest.—REILLY v. REILLY, Mo., 34 S. W. Rep. 847.

4. ADVERSE POSSESSION — Payment of Taxes.—The payment of taxes on property is not by itself evidence of corporeal possession of the property, and, without some act showing corporeal possession, will not support the plea of 10 years' prescription.—CHAMBERLAIN v. ABADIE, La., 19 South. Rep. 574.

5. ADVERSE POSSESSION — Vendor and Vendee.—The possession of a vendee, holding under a bond for title, is not adverse to his vendor, in the absence of some hostile act on the part of the vendee under a claim of right, with intent to assert such claim against the vendor.—BRADSHER v. HIGHTOWER, N. Car., 24 S. E. Rep. 120.

6. ALTERATION OF NOTE.—The alteration of a note by the payee so as to have it bear interest from date, instead of from maturity, for the purpose of making it conform to the agreement of the parties, and without fraudulent intent, does not forfeit the original debt.—OTTO v. HALFF, Tex., 34 S. W. Rep. 910.

7. ALTERATION OF NOTE — Liability of Accommodation Indorser.—Where the maker of a note previously indorsed for his accommodation alters the same without the indorser's consent, by adding the words "with interest at 10 per cent. per annum," there being at the time the maker received it, no blank space for the insertion of interest nor words indicating that interest should be expressed, the note will be invalid, as against the accommodation indorser, even in the hands of a *bona fide* holder.—FARMERS' & MERCHANTS' NAT. BANK v. NOVICH, Tex., 34 S. W. Rep. 914.

8. APPEAL—Partition — Interlocutory Decree.—A decree directing partition to be made by commissioners,

if it can be equitably done, and, if not, requiring them to so report to the next term of court, is an interlocutory decree, from which no appeal will lie.—GILLELEN v. MARTIN, Miss., 19 South. Rep. 488.

9. APPEAL—Review—Evidence.—Where, in an action tried to the court, recovery is sought on two grounds, and no finding of facts is filed, the judgment cannot be disturbed unless unsupported on either ground.—WALKER v. COLE, Tex., 34 S. W. Rep. 713.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A conveyance of all of an insolvent's property by an instrument which empowers the grantee to sell the property, make deeds in his grantor's name, and apply the proceeds in payment of the latter's debts, and provides for the return to the grantor of any surplus, is not an assignment for the benefit of creditors, but a trust deed, in the nature of a mortgage.—TITTLE v. VANLEER, Tex., 34 S. W. Rep. 715.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS — Preferred Claim.—Where, in case of a general assignment, creditors attacked a claim secured by mortgage as fraudulent, and a verdict is rendered in favor of the mortgagee, which is accepted by the court, and a new trial denied, judgment should be entered for the mortgagee as a preferred creditor.—ROBERTS v. SABIN, Wash., 44 Pac. Rep. 108.

12. ASSIGNMENT FOR BENEFIT OF CREDITORS — Reservation of Homestead.—A reservation, in a deed of assignment, of such real and personal property of the assignor as is exempt under the homestead laws of the State, does not invalidate the assignment.—HAYNES v. HOFFMANN, S. Car., 24 S. E. Rep. 103.

13. ASSIGNMENT FOR CREDITORS — Fraudulent Conveyances.—A sale of land by an insolvent debtor to his brother, on consideration that the grantee discharge debts of the grantor amounting to more than the value of the property conveyed, is not fraudulent, as against a creditor whose debt was not included in the agreement.—BAKER v. HARVEY, Mo., 34 S. W. Rep. 853.

14. ASSIGNMENT OF CHOSE IN ACTION—Notice to Garnishee.—The assignment of a chose in action, if made in good faith and for value, is effectual, as against a garnishment, though no notice be given, prior thereto, to the person holding the property, if he receive notice in time to enable him to bring it to the attention of the court before judgment is rendered against him as garnishee.—BELLINGHAM BAY BOOM CO. v. BRISBOIS, Wash., 44 Pac. Rep. 153.

15. ASSUMPSIT.—The indebitatus common count may be declared on, and a recovery thereunder had, in an action brought to recover money due the plaintiff for personal services rendered under a contract fully performed on his part, nothing remaining to be done except payment by the defendant; and a cause of action may be established by evidence of either a special or an implied contract.—SWARTZEL v. KARNES, Kan., 44 Pac. Rep. 41.

16. ASSUMPSIT—Money Loaned.—The fact that money alleged to have been loaned and advanced to defendant was paid to creditors of defendant, by his express direction, supports an allegation that such money was so loaned and delivered to defendant.—CLARKSON v. KENNETT, Mont., 44 Pac. Rep. 88.

17. ATTACHMENT — Complaint — Affidavit.—In an action commenced by attachment, that the attachment affidavit alleges a cause of action as for a trespass to land by cutting timber, whereas the complaint is for a conversion of the timber, is not ground for demurrer, but for a summary application to set the declaration aside.—LONGYEAR v. MINNESOTA LUMBER CO., Mich., 68 N. W. Rep. 567.

18. ATTACHMENT—Judgment.—A judgment for money creates a legal obligation on the part of the defendant for its payment, and an action on such judgment is one "upon a contract, express or implied," within the meaning of the statute authorizing attachments in such actions.—MEYER v. BROOKS, Oreg., 44 Pac. Rep. 391.

19. ATTORNEY AND CLIENT—Executor—Notice.—While a client is chargeable with notice of all facts relating to a transaction in which he employs an attorney that are known to such attorney, and which it is presumed he will communicate to his client, notice of facts which came to the knowledge of the attorney while acting for another, and which he has no right to communicate, or which, from their nature, he would conceal, cannot be imputed to the client.—MELMS v. PABST BREWING CO., Wis., 66 N. W. Rep. 518.

20. BANKS—Fraud of Officers.—It is a part of the duty of a banking corporation to loan money, and to collect such loans by sale of goods or other security; and where the president of the bank has the active control and management of the affairs of the bank, and, in conducting its business, enters into a conspiracy to defraud, and puts the same into execution, whereby another is damaged, the bank will be liable in tort for the damages.—JOHNSTON FIFE HAT CO. v. NATIONAL BANK OF GUTHRIE, Okla., 44 Pac. Rep. 192.

21. BILLS AND NOTES—Acceptance—Law of Place.—P, a member of a firm doing business in New York, called upon one H, in Y, S C, requesting him to buy certain cotton, and agreed that, upon receipt of the bills of lading therefor, his firm in New York would either remit currency for the price, or would promptly honor drafts therefor. In an action against H's firm to recover the amount of drafts, drawn in accordance with this agreement, which that firm had refused to accept or pay, held, that the contract to accept the drafts was governed by the law of South Carolina, where it was made, and was not affected by a statute of New York rendering a verbal promise to accept drafts invalid in favor of one who has taken a bill of exchange upon such a promise.—HUBBARD v. EXCHANGE BANK, U. S. C. C. of App., 72 Fed. Rep. 235.

22. CARRIERS OF GOODS — Delay — Measure of Damages.—Upon failure of a common carrier to deliver goods at the time agreed upon, or, if no time is specified, within a reasonable time, the rule of damages is the difference between the value of the goods at the time and place of delivery and their value at the same place at the time they should have been delivered. In such case, the inquiry as to the values should be limited to the place of delivery.—MISSOURI PAC. RY. CO. v. MCGRATH, Kan., 44 Pac. Rep. 39.

23. CARRIERS OF PASSENGERS—Negligence—Contributory Negligence. — A passenger who, before he had seated himself in a car, was injured by the negligence of defendant in causing another car to come into violent contact with the former, is not precluded from recovering merely because he did not occupy the first vacant seat he came to, nor because he incumbered himself with bundles or with the care of children, which impeded his movements.—TILLETT v. NORFOLK & W. R. CO., N. Car., 24 S. E. Rep. 111.

24. CARRIERS—Passenger—Ejection.—Plaintiff, a passenger from New Orleans to Junction City, Ky., bought a ticket from the railroad company's agent, with the agreement that he should have the right to go by way of Louisville. The ticket did not so provide, and at Lebanon Junction, where, as his ticket read, he should have changed cars, he was ejected from the train: Held, that the ejection of the passenger was lawful.—LOUISVILLE & N. R. CO. v. BRECKINRIDGE, Ky., 34 S. W. Rep. 702.

25. CHATTEL MORTGAGE—Equity of Redemption.—A sheriff cannot, by attaching personal property subject to a chattel mortgage, at the suit of an unsecured creditor of the mortgagor, acquire any right to the residue of the proceeds of a sale under the mortgage after the demands secured by the mortgage are satisfied.—FAHY v. GORDEN, Mo., 34 S. W. Rep. 881.

26. CHATTEL MORTGAGES — Foreclosure. — A mortgagee of chattels, in the foreclosure of his mortgage, must comply substantially with the requirements of the statute, where they have not been waived by the mortgagor; and, if the mortgagee fails to do so in an essential matter, he is liable to the mortgagor for the

value of the property, less the mortgage lien thereon.—CALLEN v. ROSE, Neb., 66 N. W. Rep. 638.

27. CHATTEL MORTGAGE—Validity.—A chattel mortgage in Oklahoma does not entitle the mortgagee to possession until after condition broken, but creates a lien in favor of the mortgagee, while the title remains in the mortgagor.—HIXON v. HUBBELL, Okla., 44 Pac. Rep. 222.

28. CONDEMNATION PROCEEDINGS—Damages.—Where plaintiff in condemnation proceedings maintained possession of the land by virtue of the proceedings, and did not offer to surrender it, it was properly denied the right to abandon the proceedings after verdict assessing defendant's damages.—BELLINGHAM BAY & B. C. R. CO. v. STRAND, Wash., 44 Pac. Rep. 140.

29. CONFLICT OF LAWS—Debt Contracted in Another State.—The rule that, if a certain right is given in one State as to property of a certain nature, comity requires that such right should be enforced in another State as to property of the same nature, is inapplicable to real property, and should not be extended to other property subsequently acquired in such other State.—LA SELLE v. WOOLERY, Wash., 44 Pac. Rep. 115.

30. CONSTITUTIONAL LAW—Rights of Accused.—The constitutional provision that the accused "in a criminal prosecution" shall "be confronted with the witnesses against him" is not infringed by permitting a deposition of a living witness to be read against him in an action brought to recover the value of merchandise forfeited to the United States by reason of his acts in violation of law.—UNITED STATES v. ZUCKER, U. S. S. C., 16 S. C. Rep. 641.

31. CONTEMPT— Newspaper Article. — To constitute any publication contemptuous, it must reflect upon the conduct of the court in reference to a cause or proceeding then pending in court and undetermined, and be of a character tending to influence its decision, or obstruct, interrupt or embarrass the due administration of justice.—ROSEWATER v. STATE, Neb., 66 N. W. Rep. 640.

32. CONTRACT—Assignment—Action by Assignee.—The same defenses may be interposed to an action brought by the assignee of a contract of sale, to recover the price of the goods sold, as if the suit had been instituted by the original party to the contract.—TYLER CAR & LUMBER CO. v. WETTERMARK, Tex., 34 S. W. Rep. 807.

33. CONTRACT — Defenses — Fraud. — That defendant was induced to sign a contract for the purchase of a monument by plaintiff's false and fraudulent representations that he was acting as agent of a third person is a good defense to an action for breach of such contract, though defendant can show no damage from the fraud.—FOX v. TABEL, Conn., 34 Atl. Rep. 101.

34. CONTRACT—Rescission.—In an action of tort for fraudulent representations in the sale of certain stocks, plaintiff cannot recover back the purchase money, where the counts rest only on the ground of rescission, which is not established by the evidence, and the averment of fraud is limited to a misrepresentation of the cost of the stocks to defendant, at which figure they were to have been sold to plaintiff.—GASSETT v. GLAZIER, Mass., 43 N. E. Rep. 193.

35. CORPORATION—Dissolution— Liabilities. — Where a corporation is liable in damages to an agent for having wrongfully discharged him from its service under a contract for a definite period, and is subsequently dissolved by the judgment of a court on the petition of its stockholders, it remains liable to the party injured notwithstanding the dissolution.—TIFFIN GLASS CO. v. STOEHER, Ohio, 43 N. E. Rep. 279.

36. CORPORATION—Foreign Corporation.—The validity of a sale of land belonging to minors, by their guardian, is not affected by the fact that the decree for such sale was signed by the judge of the superior court, though the clerk of such court had authority to act as probate judge; Code, § 1590, prescribing the manner in which sales may be made by guardians, being a restriction upon the discretionary power of the guardian, and not upon the authority of the court.—BARCELLO v. HAPGOOD, N. Car., 24 S. E. Rep. 124.

37. CORPORATIONS—Agents.—A stockholder of a corporation is bound to know the extent of the authority of an agent of the corporation, and therefore cannot claim, where a renewal note with sureties is given for a subscription for stock to an agent under an agreement that it shall not be delivered to the corporation until similar notes are given by all the other stockholders, the agent being without authority to make such agreement, and is delivered to the corporation before similar notes are given by all the other stockholders, and the old note is returned by the company, that there was no delivery of the note.—HARDIN v. SWEENEY, Wash., 44 Pac. Rep. 138.

38. CORPORATIONS—Officer.—The fact that one is a stockholder, director and officer of a corporation will not debar him from recovering on a *quantum meruit* for services rendered the corporation which were clearly outside his duties in either of such capacities, and which were rendered with the knowledge and acquiescence of the other directors.—SEVERSON v. BIMETALLIC EXTENSION MINING & MILLING CO., Mont., 44 Pac. Rep. 79.

39. COUNTY INDEBTEDNESS — Constitutional Limitation.—The cash assets of the county should be deducted from the outstanding indebtedness for the purpose of determining the amount of such indebtedness, within the meaning of the constitutional provision limiting the indebtedness to be incurred by counties.—STATE v. HOPKINS, Wash., 44 Pac. Rep. 134.

40. COURTS—Conflicting Jurisdiction.—Where a sufficient complaint has been filed and served, asking for the sequestration of the property of a debtor corporation and the appointment of a receiver, and the court has issued an order to show cause why a receiver should not be appointed, and forbidding interference with the assets of the corporation pending the motion, a like court in another county cannot, by declaring the corporation insolvent, and appointing a receiver therefor, acquire superior jurisdiction, where such proceedings are had while the order to show cause and the restraining order are pending in the other courts.—NORTHWESTERN IRON CO. v. LEHIGH COAL & IRON CO., Wis., 66 N. W. Rep. 515.

41. CRIMINAL EVIDENCE—Homicide—Dying Declarations.—On a trial for murder by shooting, evidence that deceased, half an hour after being shot, told the doctor that she believed she could not live, and that he then informed her that her case was hopeless, warrants the admission, as dying declarations, of her statements then made to the doctor, and her sworn statement made four hours later, though she did not die till six days later.—PEOPLE v. WEAVER, Mich., 66 N. W. Rep. 567.

42. CRIMINAL EVIDENCE—Murder—Similar Crimes.—On the trial of a defendant charged with crime, evidence of the commission by him of another similar crime, or of an attempt to commit another, is not admissible in proof of the substantive act charged; but where there is evidence tending to prove such act, but leaving room for question as to the intent with which it was done, evidence of other similar acts may be admitted to be considered on that issue alone.—PEOPLE v. THACKER, Mich., 66 N. W. Rep. 563.

43. CRIMINAL LAW—Gaming—Indictment.—An indictment alleged that a game was played at cards or dice, and that defendant played at such game with cards or dice, or some substitute therefor, at a tavern, inn, storehouse for retailing spirituous liquors, or house or place where spirituous liquors were at the time sold, retailed or given away, or in a public house, highway or some other public place, or at an outhouse where people resorted, and did bet money at said game, etc.: Held, that the indictment was not bad for duplicity.—WICKARD v. STATE, Ala., 19 South. Rep. 491.

44. CRIMINAL LAW—Libel—Indictment.—An indictment for libel, alleging that defendant did "publish,

and did cause to be published in a certain newspaper called Torch of Liberty in a certain part of which newspaper so published as aforesaid they were and are contained the false, scandalous and malicious libel," etc., when attacked after verdict, will be held to sufficiently allege the publication of the libel.—BARNUM v. STATE, Wis., 66 N. W. Rep. 617.

45. CRIMINAL LAW—Theft by Conversion.—Rev. Pen. Code, art. 877, makes it equivalent to theft for any person, having possession of personal property by contract of hiring, to fraudulently convert the same to his own use: Held, that one who obtains personal property by contract of hiring in one county, but converts the same in another, can be tried only in the latter county, though the intention to convert the same was conceived in the former.—ABBEY v. STATE, Tex., 34 S. W. Rep. 930.

46. CRIMINAL LAW — Threatening Letter.—A letter directing a person to deposit a sum of money in a certain place, and stating that, "should you fail to comply with our request, woe be unto you and yours," does not contain a sufficient threat upon which to predicate an information under Rev. Cr. Code, § 966, making it criminal to send a letter threatening to kill or injure the person of another.—HANSEN v. STATE, Tex., 34 S. W. Rep. 929.

47. CRIMINAL LAW—Venue—County Officer.—A prosecution against a county officer for soliciting a bribe outside of his county must be in the county where the bribe was solicited, and not in the county where he holds office.—STATE v. KNIGHT, Ohio, 43 N. E. Rep. 281.

48. CRIMINAL PRACTICE—Seduction—Indictment.—St. 1894, § 1214, provides that "whoever" shall, under promise of marriage, seduce "any female" under 21 years old, shall, etc.; and that there shall be no prosecution when the person charged marries the girl, etc.: Held, that the indictment need not allege either that defendant or the female seduced was unmarried.—DAVIS v. COMMONWEALTH, Ky., 34 S. W. Rep. 699.

49. DAMAGES—Exemplary Damages.—To justify the recovery of exemplary damages in an action for tort, the petition must so describe the wrongful act as to show that the case belongs to the class of cases in which such damages are recoverable. It is not sufficient to allege simply such matters as warrant the recovery of actual damages, without characterizing them as wanton, willful or malicious.—POTTER v. STAMFLI, Kan., 44 Pac. Rep. 46.

50. DEDICATION—Effect of Subsequently Acquiring.—The subdividing of property, and the making and filing of a plat thereof, by one not the holder of the legal title, though in actual possession and occupancy, is ineffectual as a statutory dedication of the streets designated on such plat.—KANSAS CITY MILLING CO. v. RILEY, Mo., 34 S. W. Rep. 835.

51. DEDICATION OF STREETS—Assent of Mortgagee.—When the owner of land, after mortgaging it, makes a plan thereof, a release by the mortgagee of certain of the lots included in the plan, by reference to the plan book, is such a recognition of the plan by the mortgagee as shows his assent to the dedication of all the streets included in the plan.—PRY v. MANKEDICK, Penn., 34 Atl. Rep. 46.

52. DEDICATION—Revocation.—Where the public authorities refuse to approve a plat dedicating a street to public use, or to recognize the street, in the absence of a public user equivalent to an acceptance the intended dedication is revocable, as to any part of such street, at the pleasure of the proprietor and abutting owners.—MAHLER v. BRUMDER, Wis., 66 N. W. Rep. 502.

53. DEED — Consideration — Parol Evidence.—Parol testimony is admissible to show the actual consideration for a deed.—WHEELER v. CAMPBELL, Vt., 34 Atl. Rep. 35.

54. DEED—What Constitutes.—An instrument executed by a husband to a wife, whereby he conveys certain land in fee-simple, with a covenant that he shall remain in possession and enjoy the rents and profits during his natural life, is a deed and not a will.—CARPENTER v. HANNIG, Tex., 34 S. W. Rep. 774.

55. DIVORCE—Abandonment.—In an action by the husband against the wife for a divorce, wherein she filed a cross-petition against him for a divorce on the ground of abandonment for more than one year, held that the period of abandonment does not terminate with the commencement of the plaintiff's action, but may extend to the filing of the defendant's cross-petition.—NEDDO v. NEDDO, Kan., 44 Pac. Rep. 2.

56. ELECTION—County Seat—Rejected Ballots.—Under the provisions of the act for the relocation of county seats, there being no requirement that abortive ballots shall be certified to the county canvassing board, such ballots cannot be counted for the purpose of making up the grand total, of which a place other than the existing county seat must receive three-fifths to be entitled to the relocation of the county seat, merely because, in the certified return of the county election board, such ballots were referred to as "ballots not reported or accounted for," or as "rejected" or "blank" ballots.—STATE v. ROPER, Neb., 66 N. W. Rep. 539.

57. EVIDENCE — Mining — Custom.—In an action to abate, as a nuisance, a ditch over plaintiff's land, maintained by defendant to carry the *detritus* from an hydraulic mine to a river, evidence of a custom of using such a ditch in all hydraulic mining is admissible under the general issue.—JACOB v. DAY, Cal., 44 Pac. Rep. 243.

58. EVIDENCE — Parol Agreement.—Evidence of a parol agreement, made at the time of the execution of notes, that the maker should have the right to offset an account then existing in his favor, is not a variance from the contract embodied in the notes.—BENNETT v. TILLMON, Mont., 44 Pac. Rep. 80.

59. EVIDENCE—Signature.—In an action on a note, where the signature of the maker was denied, bank checks and other writings containing genuine signatures, though otherwise incompetent, were admissible as standards of comparison.—MOORE v. PALMER, Wash., 44 Pac. Rep. 142.

60. EVIDENCE — Written Memorandum — Parol Evidence.—A letter of instructions accompanying a release of a vendor's lien in escrow which recites that the consideration "is to be paid by vendee in thirty days," signed by the vendors only, and not purporting to be the contract itself, does not exclude parol evidence to vary the time of payment.—JOHNSON v. PORTWOOD, Tex., 34 S. W. Rep. 787.

61. EXEMPTIONS—Construction of Laws.—Exemption laws being remedial, beneficial and humane in their character, will be liberally construed; and when it does not clearly appear whether certain property is or is not embraced within the exempting statute, the debtor will generally be allowed the benefit of the doubt, and suffered to retain the property.—NELSON v. FIGHTMASTER, Okla., 44 Pac. Rep. 213.

62. EXEMPTIONS—Waiver.—An insolvent debtor, who waived his right only to exemptions of personal property, can invest his money in a homestead, and thereby defeat his creditor.—REEVES v. PETERMAN, Ala., 19 South. Rep. 512.

63. EXPERT TESTIMONY—Competency of Employee.—In an action against a master for injuries alleged to have been caused by his negligence in employing an incompetent person as head sawyer in a sawmill, witnesses who had seen such person engaged in his employment, and who were familiar with the requirements of the place, may testify as to whether he was competent.—LEWIS v. EMERY, Mich., 66 N. W. Rep. 569.

64. FEDERAL COURTS—Circuit Court—Jurisdictional Amount.—A statute of Colorado provides that "shareholders in banks shall be held individually responsible for debts of said associations in double the amount of the par value of the stock owned by them respectively." Laws 1885, p. 264. Held, that the remedy of creditors of such corporations under this statute, unless in exceptional cases requiring an accounting, is at

law only, and that the claims of creditors against shareholders are several, and cannot be joined in one action to make up the amount required to give jurisdiction to the United States circuit court.—AUER v. LOMBARD, U. S. C. C. of App., 72 Fed. Rep. 209.

65. FRAUDULENT CONVEYANCES—Change of Possession—Chattel Mortgages.—A chattel mortgage on a stock in trade, which allows the mortgagor to retain possession and continue the sales, but requires a daily accounting of proceeds to the mortgagee, to be applied on the mortgage debt, is not fraudulent on its face, as to other creditors of the mortgagor.—ROCK ISLAND NAT. BANK v. WESTERN LUMBER CO., Mo., 34 S. W. Rep. 869.

66. FRAUDULENT CONVEYANCES — Partnership.—A mortgage of a partner's individual property to the firm, executed for the purpose of increasing the firm's credit with a bank to which it owed a *bona fide* debt, was transferred to the bank within 10 days after its execution,—both parties being then solvent,—and two years later the firm made an assignment for the benefit of creditors: Held, that such transfer was not invalid as to subsequent creditors of the firm, though it was not recorded until the assignment.—DURHAM FERTILIZER CO. v. HEMPHILL, S. Car., 24 S. E. Rep. 85.

67. GARNISHMENT—Lien—Priority.—Where checks on a general deposit are not presented to the bank till after it has been garnished by a judgment creditor of the depositor, though drawn before garnishment, the fund is liable to the satisfaction of the judgment.—COMMERCIAL BANK OF TACOMA v. CHILBERG, Wash., 44 Pac. Rep. 264.

68. GUARANTY OF CREDITS—Contract of Insurance.—A corporation which issues a contract whereby it guaranties a merchant against loss from sales on credit resulting from the insolvency of customers, to be determined in a manner specifically described, is an insurance company, within the meaning of Rev. St. §§ 1977, 1978, and the contract is one of insurance.—SHAKMAN v. UNITED STATES CREDIT SYSTEM CO., Wis., 66 N. W. Rep. 528.

69. GUARANTY—Parol Evidence.—On an issue as to whether a guaranty "to hold myself responsible for all goods bought by G of S" was a continuing guaranty, or was confined to the single purchase made at the time it was given, it is competent to show the nature of the contract between G and S, if known to the guarantor.—SULLIVAN v. ARCAND, Mass., 43 N. E. Rep. 198.

70. GUARDIAN — Use of Ward's Funds.—A guardian who, in good faith, mingles his ward's funds with his own, and uses the same in his business, it not appearing that he was able at all times to invest the same, is chargeable only with legal interest thereon, with annual rests, notwithstanding that the current rate of interest was greater.—COUSINS' ESTATE, Cal., 44 Pac. Rep. 182.

71. HABEAS CORPUS — Custody of Child.—The retention of a child by one to whose custody it is awarded by a court in *habeas corpus* proceedings is not an unlawful detention for which the custodian can be held liable in damages, though the order is subsequently set aside on appeal.—LOVELL v. HOUSE OF THE GOOD SHEPHERD, Wash., 44 Pac. Rep. 253.

72. HIGHWAY — Dedication.—To constitute a dedication of land for a highway, the owner of the land must set apart for such purpose so much of the land as he intends to be appropriated therefor, and must give it over to the public with the intention that it be used as such, and there must be an acceptance thereof by the public.—ALTON v. MEEUWENBERG, Mich., 66 N. W. Rep. 571.

73. HOMESTEAD — Abandonment.—Proof of the acquirement of a new homestead is not essential to show abandonment of a former homestead.—MOORE v. JOHNSTON, Tex., 34 S. W. Rep. 771.

74. HOMESTEAD AND EXEMPTIONS—Filing of Declaration.—A married woman's declaration of homestead, filed on lands on which she resided, and which were her separate property, is not so affected by subsequent divorce proceedings, in which no reference is made to the homestead property, as to render it liable to the payment of a debt not within the exceptions recited in Civ. Code, § 1265, exempting a homestead so declared from forced sale for any liability of the owner.—CITY STORE v. COFER, Cal., 44 Pac. Rep. 168.

75. HOMESTEAD — Constituent of Family.—Where a granddaughter, with her parents' consent, lives with her grandmother, by whom she is supported until the grandmother's death, and the arrangement is terminable at the will of either the grandmother, the child, or her parents, such grandchild is not a constituent of her grandmother's family, so as to entitle her to the homestead on her grandmother's death.—PHILLIPS v. PRICE, Tex., 34 S. W. Rep. 784.

76. HOMESTEAD—Occupancy.—Where a tract of land is purchased for a homestead, in order to preserve a debtor's right to the homestead exemption he must actually occupy the same as a residence within a reasonable time after the purchase. The constitution and statutes require actual occupancy in order to preserve a homestead right.—EDGERTON v. CONNELLY, Kan., 44 Pac. Rep. 22.

77. HOMESTEAD — Sale on Judgment.—Under Civ. Code, §§ 1240, 1241, providing that the homestead shall be exempt from forced sale except on judgments recovered before the declaration of homestead is filed, and which constitute liens upon the premises, a homestead is not subject to forced sale under an execution issued on a justice's judgment which has not been recorded, so as to create a lien on the land, though the declaration of homestead was not filed until after the levy of the execution.—BEATON v. REID, Cal., 44 Pac. Rep. 167.

78. HUSBAND AND WIFE—Community Property.—The presumption that property acquired by a husband or wife is community property is overcome by evidence that it was purchased wholly with the separate money of the wife.—WEYMOUTH v. SAWTELLE, Wash., 44 Pac. Rep. 109.

79. HUSBAND AND WIFE — Separate Property of Wife.—Rev. St. 1879, § 3296, provides that property coming to a married woman by inheritance shall remain under her sole control. A husband purchased land with such property of his wife, taking title in his own name: Held, that a mortgage by the wife alone on the land passed all the equitable interest the wife had in the land.—OWINGS v. WIGGINS, Mo., 34 S. W. Rep. 877.

80. INJUNCTION—Bond.—No action can be maintained on an injunction undertaking, except in accordance with its terms; and this is true with respect to the principal as well as the sureties.—COLUMBUS, H. V. & T. RY. CO. v. BURKE, Ohio, 43 N. E. Rep. 282.

81. INJUNCTION — Receiver—Notice.—2 Hill's Code, § 270, provides that no injunction shall be granted until it shall appear that one or more of the opposite parties have had notice of the application, except in emergency cases: Held, in an action by a partner for an accounting, that it was error to grant an order without notice restraining defendant from interfering with the firm property, or without making any provision therein for a hearing, before continuing the same in force.—LARSEN v. WINDER, Wash., 44 Pac. Rep. 123.

82. INSURANCE — Agent.—An agent of an insurance company, authorized to issue policies of insurance and consummate the contract, binds the company by any act, agreement, waiver, or representation, within the ordinary scope of insurance business, which is not known by the assured to be outside the authority granted to the agent.—MILWAUKEE MECHANICS' INS. CO. v. BROWN, Kan., 44 Pac. Rep. 35.

83. INSURANCE—Conditions — Waiver.—Parol waiver by a local insurance agent of conditions of the policy is void where the policy requires such waiver to be indorsed on it in writing.—OSHKOSH MATCH WORKS v. MANCHESTER FIRE ASSUR. CO., Wis., 66 N. W. Rep. 525.

84. INSURANCE—Limitation of Time.—Letters written to the general agents of an insurance company by a local agent who had nothing to do with the adjustment of plaintiff's loss, containing mere suggestions as to the settlement of the claim, and of whose contents plaintiff had no knowledge until long after the time limited by the policy for bringing suit had expired, are incompetent to show a waiver of such limitation. —HILL V. PHŒNIX INS. CO. OF BROOKLYN, N. Y., Wash., 44 Pac. Rep. 146.

85. INSANE PERSON — Power of Attorney.—Where a wife, executing a power of attorney to her husband, is at the time insane, to his knowledge, one to whom he transfers a note belonging to her cannot claim it as against her, though the money received therefor was expended in extinguishing claims against her, unless they were valid claims, which would not be the case with debts contracted by the husband under the power of attorney.—ELIAS V. ENTERPRISE BUILDING & LOAN ASS'N, S. Car., 24 S. E. Rep. 102.

86. INSURANCE—Pleading.—In a suit on a policy of fire insurance covering a stock of liquors, the plea that, after the loss, plaintiff falsely represented in a sworn statement to the insurer, contrary to a condition in the policy that false swearing before or after a loss would invalidate the policy, that she had renewed her license to retail liquors, constitutes no defense, where there is no averment in the complaint or plea which establishes any relation between the license and the insurance.—FEIBELMAN V. MANCHESTER FIRE ASSUR. CO., Ala., 19 South. Rep. 540.

87. INSURANCE POLICY — Reformation.—Evidence that plaintiff applied for insurance in his own name on property to which he alone had title, and that he did not discover, till after the loss, that the policy was made payable to his wife, justified a reformation of the instrument, no motive being shown for plaintiff to insure in his wife's name.—LANCASHIRE INS. CO. V. LUCAS, Ky., 34 S. W. Rep. 899.

88. INTOXICATING LIQUOR — Indictment.—An indictment charging a defendant with selling or giving away liquors, without averring that it was contrary to law, is insufficient to support a conviction.—HUBBARD V. STATE, Ala., 19 South. Rep. 519.

89. INTOXICATING LIQUORS—Evidence.—In a prosecution for an illegal sale of intoxicating liquor, it is error for the court to instruct the jury that evidence of other unlawful sales may be considered, without any restriction, to determine whether the defendant is guilty of making the sale on which the State elects to rely for a conviction.—STATE V. MARSHALL, Kan., 44 Pac. Rep. 49.

90. JUDGMENT BY DEFAULT.—A refusal to set aside a default judgment against a corporation for excusable neglect was proper, where the complaint and summons were duly served on its secretary, and five days afterwards handed by him to its president, who read them, and observed their date, but took no action in regard to them till after judgment by default had been entered.—SHAY V. CHICAGO CLOCK CO., Cal., 44 Pac. Rep. 287.

91. JUDGMENT — Injunction. — A judgment of foreclosure of a ditch lien will not be enjoined on the ground that the work on the drain was not in fact done according to the plans and specifications.—SHRACK V. COVAULT, Ind., 43 N. E. Rep. 229.

92. JUDGMENT — Payment.—Money voluntarily paid to satisfy a judgment which was subsequently reversed cannot be recovered back, where it appears that the original claim was a just one, and that the judgment was reversed for a mistake in procedure.—TRASDALE V. STOLLER, Mo., 34 S. W. Rep. 873.

93. JUDGMENT—Rendition.—A judgment rendered in vacation is void. Where a judgment is void because rendered in vacation, no appeal lies therefrom. —BACKER V. EBLE, Ind., 43 N. E. Rep. 233.

94. KIDNAPPING—What Constitutes.—A father, taking his child, who was of tender years, out of the State, with its consent and with the consent of its mother, who had been awarded the custody of the child in divorce proceedings, in order that the child may not be present in a criminal trial in which it had been subpœnaed as a witness, is not guilty of kidnapping. —JOHN V. STATE, Wyo., 44 Pac. Rep. 51.

95. LANDLORD AND TENANT—Lease—Damages.—In an action against a lessor, after expiration of the term, for breach of lease by refusal to deliver possession, where the rent was payable in shares of certain crops to be planted on certain parts of the land, witnesses familiar with the land were properly allowed to testify to its average yield of the various crops contemplated, cost of production and marketing, and the value of such crops during the year of the lease, to show damages.—CHEW V. LUCAS, Ind., 43 N. E. Rep. 235.

96. LANDLORD'S LIEN—Enforcement.—Where a tenant or a purchaser from him is about to remove and sell property which is subject to a landlord's lien, a warrant may issue for the enforcement of the lien, though such removal and sale is without any fraudulent intent.—LEONARD V. BROCKMAN, S. Car., 24 S. E. Rep. 96.

97. LANDLORD'S LIEN—Priority.—Where land is sold on the agreement that, on failure of the grantee to pay the purchase price note when due, he shall become a tenant of the grantor, and liable for a certain sum for rent, on non-payment of the note, the lien of the grantor on the crops, as landlord, is superior to that of a mortgagee advancing money thereon, under the belief that the grantee is the owner of the land, there being no question of estoppel or waiver.—WAITE V. CORBIN, Ala., 19 South. Rep. 505.

98. LIBEL—Privileged Publication—Pleading.—In an action for libel, the defense of privileged publication, within Civ. Code, § 47, must be pleaded.—GILMAR V. MCCLATCHY, Cal., 44 Pac. Rep. 241.

99. LIFE INSURANCE—Beneficiary.—The insured in a life policy payable to his executor or administrator may, without the consent of the insurer, designate his mother as his beneficiary, and she is entitled to receive the proceeds thereof.—PRUDENTIAL INS. CO. V. YOUNG, Ind., 43 N. E. Rep. 253.

100. LIFE INSURANCE — Suicide.—In an action on a life policy making "self-destruction by the insured, whether sane or insane," an avoidance of the policy, it was error to instruct that death from poison self-administered would not avoid the policy, unless it was shown that it was "willfully and deliberately" taken by the insured, with intent to commit suicide; and such error was not cured by a subsequent instruction directing a verdict for defendant if "deceased came to his death by poison taken with intent to commit suicide."—UNION CENT. LIFE INS. CO. V. HOLLOWELL, Ind., 43 N. E. Rep. 277.

101. LIMITATION OF ACTIONS—Executory Contract.—The statute commences to run against a cause of action in favor of the purchaser against the vendor in a contract to convey land for failure to convey from the date of its breach, as by a conveyance to a third person and not from the date of its execution.—MAITLAND V. ZANGA, Wash., 44 Pac. Rep. 117.

102. LIMITATION OF ACTIONS—Indorsement of Non-negotiable Note.—An action against the indorser of a non-negotiable note, on his contract of guaranty thereby arising, is not an action on the note, within the meaning of Gen. St. § 1870, fixing the statute of limitations in such actions at 17 years, but is merely an action on a written contract (Gen. St. § 1871), and must be brought within 6 years. — CARPENTER V. THOMPSON, Conn., 34 Atl. Rep. 105.

103. MARRIAGE—Breach of Promise — Evidence.—In an action for breach of promise of marriage it is not necessary that there be direct and positive evidence of the marriage contract sufficient in itself to make proof of the same. The relations of the parties and the circumstances surrounding them are proper matters to be considered and given weight in deter-

mining that question.—KENNEDY v. RODGERS, Kan., 44 Pac. Rep. 47.

104. MARRIED WOMEN — Mortgage of Separate Estate.—Under the constitution and statutes of South Carolina relating to the property and contracts of married women, a married woman cannot pledge her estate by mortgage to secure the contract of another, which has no reference to her separate property, even though that other be her husband, and the mortgage purports in positive terms to bind her separate estate. —AMERICAN MORTG. CO. OF SCOTLAND v. OWENS, U. S. C. C. of App., 72 Fed. Rep. 219.

105. MASTER AND SERVANT—Defective Appliances—Assumption of Risk.—An engineer, who, knowing the dangerous condition of a boiler, and after complaining of the condition thereof, continued to use the same assumed the risk of an explosion.—BRIDGES v. TENNESSEE COAL, IRON & RAILROAD CO., Ala., 19 South. Rep. 495.

106. MASTER AND SERVANT — Assumption of Risk.—A servant assumes risks arising from defective appliances used or to be used by him, or from the manner in which the business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment or continues in it without complaint or objection as to the hazards.—MALM v. THELIN, Neb., 66 N. W. Rep. 650.

107. MASTER AND SERVANT—Contract of Employment. —A contract whereby one, in consideration of the release of a claim for damages against him, agrees to employ the claimant at certain wages so long as the works of the first are kept running, or until the other shall see fit to quit, is not void, either for uncertainty, for want of mutuality, or as within the statute of frauds.—CARTER WHITE LEAD CO. v. KINLIN, Neb., 66 N. W. Rep. 536.

108. MASTER AND SERVANT — Contributory Negligence.—The inferential facts of due care and freedom from fault on plaintiff's part, found by the special verdict, will not warrant a judgment in his favor, unless the primary facts on which they are founded are such that the conclusion announced may be reasonably drawn therefrom.—TERRY v. LOUISVILLE, N. A. & C. RY. CO., Ind., 43 N. E. Rep. 273.

109. MASTER AND SERVANT—Injuries—Assumption of Risk.—In an action by a servant of a railroad company for personal injuries, it appeared that defendant was engaged in widening its tunnel; that the roof of the tunnel was supported by wooden bents, supported by upright posts, across which were laid loose boards of irregular lengths, which therefore jointed on various bents; that, in removing such support, instead of taking the bents down in order, defendant's foreman directed plaintiff to pull out the fourth bent, upon doing which the three bents, left disconnected from the others, fell upon plaintiff; and that neither plaintiff nor defendant knew that the boards jointed "partly on each of the four bents:" Held, that it did not appear that plaintiff had not assumed the risk of such danger.—LOUISVILLE, N. A. & C. RY. CO. v. QUINN, Ind., 43 N. E. Rep. 240.

110. MASTER AND SERVANT—Negligence.—A railroad company cannot be held liable for an injury resulting to a brakeman who, in coupling cars, steps into a cattle-guard, in the daytime, and a place where he is familiar with the track.—FULLER v. LAKE SHORE & M. S. RY. CO., Mich., 66 N. W. Rep. 598.

111. MECHANICS' LIENS—Completion of Contract.—A building contract provided that all payments to the contractor should be made on certified statements of the architects, who were employed to supervise the construction of the building at a compensation of 5 per cent. of its cost, and that final settlement should be made on their certificate, showing completion of the contract according to specifications: Held that, as the last act required of the architects was to give a final certificate of satisfactory construction, their time for filing a lien for services did not begin to run until the performance of such act.—BENTLEY v. ADAMS, Wis., 66 N. W. Rep. 505.

112. MECHANIC'S LIEN—Payment by Note.—The mere fact that the owner of real property has given his note for a portion of the amount due for materials furnished for making erections on his property does not relieve such property from a mechanic's lien filed against the same for the entire amount of the material so furnished.—LIVESY v. HAMILTON, Neb., 66 N. W. Rep. 644.

113. MINING CLAIMS—Location in Town Limits.—The fact that land on which discovery and location of a mining claim are made is within the patent limits of a town will not affect the title of the locator, where it was known prior to the patent to the town that a mineral vein existed where the discovery and location were made.—MOYLE v. BULLENE, Colo., 44 Pac. Rep. 69.

114. MORTGAGE—After-acquired Title.—A mortgagor, who was entitled as heir, to a one-fourth interest in certain lands, conveyed, by mortgage, "all her interest, either in fee-simple or expectancy or remainder, in the lands inherited by her," and covenanted that she was seised of a one-fourth interest in such lands. Subsequently she purchased the entire tract at a sale by the administrator of her decedent, from money received from decedent's estate: Held, that the after-acquired title, beyond the one-fourth interest in the land, did not inure to the mortgagee, or purchaser from him at a foreclosure sale.—WHEELER v. AYCOCK, Ala., 19 South. Rep. 497.

115. MORTGAGE—Construction—Conveyance of Homestead.—An agreement in a trust deed to a foreign corporation, made in Louisiana, that it and notes secured thereby should be construed and governed by the laws of Arkansas, is not an admission or agreement that the making of the contract evidence by such deed and notes was a doing of business in Arkansas, within the statutes imposing conditions upon foreign corporations in order that their contracts made in the course of such business may be binding on citizens of Arkansas who are parties thereto. — BRITISH & A. MORTG. CO. v. WINCHELL, Ark., 34 S. W. Rep. 891.

116. MORTGAGE—Deed Absolute in Form.—While a preponderance of the evidence is sufficient to establish an issue in any civil action, and while this court will not, in the exercise of its appellate jurisdiction, weigh conflicting evidence, still, in order to sustain a finding for the plaintiff in an action to have a deed absolute in form declared a mortgage, the evidence on behalf of plaintiff, when taken together, and without regard to the contradicting evidence, should present a state of facts consonant with reason, and consistent in its different parts.—STALL v. JONES, Neb., 66 N. W. Rep. 653.

117. MORTGAGE—Fixtures.—Under a mortgage of a brewery, and its machinery and appliances for making beer, all the machinery and appliances used for that purpose, and on the premises, and such as may be substituted in lieu of other machinery that becomes useless or requires repairing, passes to the mortgagee. —REYMAN v. HENDERSON NAT. BANK, Ky., 34 S. W. Rep. 697.

118. MORTGAGE—Property Covered.—A provision in a trust deed, that "all machinery now upon, or which may hereafter be put upon, said premises, whether attached or detached," shall be covered by the deed, does not apply to machinery afterwards put on the land by a tenant.—POLLE v. ROUSE, Miss., 19 South. Rep. 481.

119. MORTGAGES—Acknowledgment—Impeaching Officer's Certificate.—Where mortgages were admitted to have been signed by husband and wife in the presence of the notary, and no fraud or duress is shown, the certificate of the notary as to their due acknowledgment cannot be impeached by parol evidence.—AMERICAN FREEHOLD LAND MORTGAGE CO. v. THORNTON, Ala., 19 South. Rep. 529.

120. MORTGAGES—Foreclosure—Lis Pendens.—A judgment rendered in an action to foreclose a mortgage, in which a *lis pendens* was not filed within the time required by Sanb. & B. Ann. St. § 3187, though irregular, is good on collateral attack.—HUNTINGTON v. MEYER, Wis., 66 N. W. Rep. 500.

121. MORTGAGES — Foreclosure — Pleading.—A complaint which states facts sufficient to entitle plaintiff to a foreclosure of a mortgage on premises on which defendant has a subsequent lien is good against a general demurrer, though the action purport to be one to remove a cloud from title.—DAMON v. LEQUE, Wash., 44 Pac. Rep. 261.

122. MORTGAGES—Foreclosure Sale.—The right of a mortgagee to confirmation of a sale under his mortgage is not affected by the pendency of a separate action by the mortgagor against the purchasers, to which the mortgagee was not made a party, to set aside the sale.—SOUTHERN MUTUAL BUILDING & LOAN ASS'N OF ATLANTA, GA., v. RYAN, S. Car., 24 S. E. Rep. 195.

123. MORTGAGES—Reformation—Mutual Mistake.—A pre-existing debt is sufficient consideration for a mortgage to entitle the mortgagee to a correction of a mutual mistake therein, as against the mortgagor and a subsequent purchaser with notice.—CITIZENS' NAT. BANK OF ATTICA v. JUDY, Ind., 43 N. E. Rep. 259.

124. MUNICIPAL CORPORATION—Election for Issuance of Bonds.—A city charter provided that bonds for a city market shall not be issued "unless the qualified electors of said city, voting in their respective wards, shall have authorized the issuing of said bonds by a majority of their votes cast at any regular election, or at a special election called for the purpose;" and a provision subsequently added to such charter that no debt should be incurred by the city for an electric plant unless authorized by the qualified electors of said city "voting thereon" shows a legislative intent to provide a different rule in each case: Held that, where a proposition for issuance of market bonds was placed on a general election ticket, a majority of all votes cast at the general election controls, and not a majority of those cast on the bonding proposition.—STEBBINS v. JUDGE OF SUPERIOR COURT OF GRAND RAPIDS, Mich., 66 N. W. Rep. 594.

125. MUNICIPAL CORPORATIONS—Public Health—Filling Low Lots.—Act 1830, amending the charter of the city of Charleston, authorizing the city to fill up low lots, declared to be public nuisances by the board of health, and to recover the cost from the landowner if it does not exceed one-half the value of the lot, is a valid exercise of the police power; the general assembly having the right to delegate such power to the city authorities.—CITY COUNCIL OF CHARLESTON v. WERNER, S. Car., 24 S. E. Rep. 207.

126. MUNICIPAL CORPORATIONS—Street Improvements.—The provisions of Rev. St. 1894, § 4288 *et seq.*, authorizing city councils to improve streets and contract for the work to be let to the best bidder after advertising, the cost of such improvement to be ultimately assessed against abutting property, must be strictly followed, and the letting of a contract containing provisions materially more favorable to the contractor than the requirements under which the bids were invited and received destroys the benefit of the competition intended to be realized by the statute. Such contract is illegal, and its performance may be enjoined.—WICKWIRE v. CITY OF ELKHART, Ind., 43 N. E. Rep. 216.

127. MUNICIPAL CORPORATIONS—Street Paving—Contract.—A provision in a paving contract requiring the contractor to keep the pavement in good repair for five years, except repairs due to cutting through the pavement for laying pipes, etc., renders the assessment therefor against the property owners invalid, the charter of the city requiring the expenses of repairing streets to be paid from the ward fund.—BOYD v. CITY OF MILWAUKEE, Wis., 66 N. W. Rep. 603.

128. MUTUAL BENEFIT INSURANCE — Assessments.—Where the board of trustees of a mutual benefit association, when less than a quorum was present, after official notice of the death of members, ordered assessments, the irregularity, if any, was cured by the approval of the minutes of such meeting at a subsequent meeting, when a quorum was present.—WOLF v. MICHIGAN MASONIC MUT. BEN. ASS'N, Mich., 66 N. W. Rep. 576.

129. NATIONAL BANKS—Insolvency—Assessment.—The complaint, in an action by the receiver of an insolvent national bank to enforce an assessment on the shareholders, made by the comptroller of the treasury, need not aver that there was a necessity therefor, or that the comptroller determined that there was such necessity though the law provides that the comptroller may enforce the individual liability of the stockholders, if necessary to pay the debts of the bank. It is enough that the complaint alleges that the comptroller made the assessment and directed its enforcement.—O'CONNOR v. WITHERBY, Cal., 44 Pac. Rep. 287.

130. NEGOTIABLE INSTRUMENT—Bona Fide Purchasers.—A writing by which a debtor gives his creditor the option of selecting from all notes belonging to the debtor in the hands of his pledgee which shall remain after payment of the amount for which they were hypothecated such paper as the creditor is willing to take in payment of his claim does not make the creditor a purchaser "in the usual course of business" of any particular note in the pledgee's hands.—BURNHAM v. MER. EXCH. BANK, Wis., 66 N. W. Rep. 510.

131. NEGOTIABLE INSTRUMENTS—Forged Renewals.—A bank, which holds a note made by two persons as principal and surety, in accepting, in good faith, at maturity, a renewal note to which the name of the surety was forged by the principal, is not bound to know the handwriting of the surety, and is, hence, not guilty of negligence, entitling the surety to a discharge from liability on the original note, in failing to compare the surety's signatures on the two notes, respectively, with reference to ascertaining the genuineness of that on the renewal note.—LYNDONVILLE NAT. BANK v. FLETCHER, Vt., 34 Atl. Rep. 38.

132. NEGOTIABLE INSTRUMENT—Note—Consideration.—A note without other consideration than the transfer, by delivery, of a certificate of the register of the United States land office, to the effect that the person to whom it was issued had taken the preliminary steps towards entering as a homestead the land described therein, which land had, before the making of such note, been abandoned by such entryman before he was entitled to a final certificate or patent therefor, is invalid for want of consideration.—MCCOLLUM v. EDMONDS, Ala., 19 South. Rep. 501.

133. NEGOTIABLE INSTRUMENT—Notes — Liability of Trustee.—Unsubscribed stock of a bank was issued to T, its president as trustee for the bank, and a note was given by the president, payable to the bank, signed, "T, Trustee for Bank." The proceeds from any of such stock, when sold, as well as all dividends there on, were credited to the bank. The note was renewed each six months the amount of the new note being reduced according to the amount received from the sale of such stock: Held, that on the insolvency of the bank, T was not personally liable on the note to the receiver appointed for the bank.—NEPTUNE v. PAXTON, Ind., 43 N. E. Rep. 276.

134. NEW TRIAL—Newly-discovered Evidence.—Before a new trial should be granted on the ground of newly-discovered evidence, due diligence prior to the trial in respect to such evidence must be shown; and to this end it is not sufficient for the moving party to merely allege that he used due diligence, but he must show the facts, so that the court can see whether there was due negligence.—LUKENS v. GARRETT, Kan., 44 Pac. Rep. 23.

135. NEGOTIABLE NOTE—Agreement to Pay Taxes.—A promissory note containing a stipulation to "pay all taxes assessed against the real estate and the mortgagee's interest therein, described in the mortgage

given to secure this note, until it is paid," is not negotiable.—WALKER v. THOMPSON, Mich., 66 N. W. Rep. 584.

136. OFFICE AND OFFICERS — Civil Liability.—An attorney for persons having claims against the government on account of a readjustment of their salaries as postmasters, has no right of action against the postmaster general because, in sending drafts to the claimants on account of their claims, he informed them that no attorney's services were necessary to the presentation of such a claim, that congress desired all the proceeds to reach the person really entitled thereto, and that the claims were sustained or rejected according to the evidence furnished by the records of the department.—SPALDING v. VILAS, U. S. S. C., 16 S. C. Rep. 631.

137. PARTITION — Judgment.—A judgment ordering partition according to the will of testator, and directing the commissioners to charge the shares of certain of the parties with the sums expressly laid upon them by the will, is not void as conditional, because it further directs that, if the sums so charged shall be paid before the commissioner acts, the shares should be relieved of the charges.—SIMMONS v. JONES, N. Car., 24 S. E. Rep. 114.

138. PARTITION — Limitations.—While the 15-years statute is the proper one to be pleaded in an action for partition, yet a plea of the 20-years statute in such action is also good.—WAYMIRE v. WAYMIRE, Ind., 43 N. E. Rep. 267.

139. PARTNERSHIP.—Evidence that two farmers, purchasing a threshing machine, paid for the same with their joint and several notes, secured by a chattel mortgage on the machine purchased, and jointly took possession of and used the machine in threshing grain for others, will not support a finding that the threshing machine was partnership property, nor that a copartnership relation existed between the farmers. Such evidence warrants, rather, the conclusion that the farmers were joint owners, or tenants in common of the machine.—STATE BANK OF LUSHTON v. O. S. KELLEY CO., Neb., 66 N. W. Rep. 619.

140. PARTNERSHIP—Evidence.—A statement to plaintiff, by one not a party to the suit, that he was not a partner of the parties, is incompetent to bind defendant, who was not present when the statement was made.—WIGGIN v. FINE, Mont., 44 Pac. Rep. 75.

141. PLEDGE—Sale of Pledged Property.—A pledgee, in selling the pledged property on default, is bound to use reasonable diligence to obtain its full value, and this duty includes the fixing of a reasonable time and place of sale.—GUINZBURG v. H. W. DOWNS CO., Mass., 43 N. E. Rep. 194.

142. PLEDGE — When Title Passes.—Where goods which the consignee had agreed to pledge as security for a *bona fide* debt were delivered to a carrier for transportation to the pledgee, under a bill of lading expressly naming him as consignee, there was a valid delivery of the pledge, which, in the absence of fraud, passed title, as against an attachment levied on the goods in transit.—TOMS v. WHITMORE, Wyo., 44 Pac. Rep. 56.

143. PRINCIPAL AND AGENT—Agency.—Merely holding out a person as agent does not estop the alleged principal from denying such person's authority to contract in his behalf, unless the representations were made under such circumstances that the principal should have expected that they would be relied upon, and unless they were actually relied upon in good faith, to the injury of an innocent party.—CLARK v. DILLMAN, Mich., 66 N. W. Rep. 570.

144. PRINCIPAL AND AGENT — Authority to Employ Subagent.—An agent who, in good faith and with the consent of his principal, selects a suitable person as subagent, is not liable to the principal for the acts of such subagent.—DAVIS v. KING, Conn., 34 Atl. Rep. 107.

145. PRINCIPAL AND AGENT — Authority to Receive Payment.—The fact that one acted as agent for a mortgagee in taking a mortgage, and in receiving interest payments on coupon interest notes, did not authorize the mortgagor to pay the principal to him, where the mortgagee himself kept possession of the securities, and did not surrender the several interest coupons till he received the money from the agent.—WESTERN SECURITY CO. v. DOUGLASS, Wash., 44 Pac. Rep. 257.

146. PRINCIPAL AND SURETY — Liability of Surety.—Sureties on an official bond securing the faithful performance of the duty of an officer holding an office the term of which is fixed are not liable for any default of the principal beyond the term under which the bond is given, and provisions of law authorizing officers to hold over until their successors are appointed and qualified can only extend the liability of sureties for such reasonable time as, with due diligence, would enable his successor to be appointed and qualified.—BOARD OF ADMR'S OF INSANE ASYLUM OF THE STATE OF LOUISIANA v. MCKOWEN, La., 19 South. Rep. 553.

147. PRINCIPAL AND AGENT — Proof of Agency.—Agency cannot be proven by the mere declarations of one assuming to act in that capacity.—ANHEUSER-BUSCH BREWING ASS'N v. MURRAY, Neb., 66 N. W. Rep. 635.

148. PUBLIC LANDS — Permit to Cut Timber.—A permit, granted by the secretary of the interior, to cut timber on the public lands of the United States, did not attach to land upon which a homestead filing had been previously made, and remained uncanceled.—NELSON v. BIG BLACKFOOT MILLING CO., Mont., 44 Pac. Rep. 81.

149. PUBLIC LANDS — Riparian Rights.—Land under navigable waters passes by a private grant only when so expressly provided for by the sovereign authority, and there is no presumption that there has been any act of the government which could have the effect of passing away its title.—ROSBOROUGH v. PICTON, Tex., 34 S. W. Rep. 791.

150. QUO WARRANTO—Forfeiture of Franchise.—On application by the attorney-general for leave to bring proceedings to forfeit the franchise of a city water company for failure to keep an account of the cost of the construction of its plant, so as to enable the city to exercise its option to purchase the plant, as required by the city ordinance granting the company the franchise, the acts of the city should be considered in determining whether the right to bring such a proceeding has been waived.—STATE v. JANESVILLE WATER-POWER CO., Wis., 66 N. W. Rep. 512.

151. RAILROAD AID BONDS—Validity.—A power given by a municipal charter granted by the State of Indiana in 1847 "to take stock in any chartered company for making roads to said city" authorized a subscription to the capital stock of a railroad company building to the city.—CITY OF EVANSVILLE v. DENNETT, U. S. S. C., 16 S. C. Rep. 613.

152. RAILROAD COMPANIES — Accident at Crossing—Negligence.—The driver of a vehicle, who, at the signal of the street flagman, which, by Birmingham City Code, § 465, is an assurance that the railroad track may be crossed in safety, goes upon the track without stopping his team in order to look and listen, is not chargeable with negligence.—ALABAMA, G. S. R. Co. v. ANDERSON, Ala., 19 South. Rep. 516.

153. RAILROAD COMPANY — Crossings — Contributory Negligence.—Where plaintiff, who approached a railway crossing along a highway which ran parallel with the railway track, and from which the approaching train was visible at the distance of 800 feet from any point on the highway within 200 feet of the crossing, failed to look for the train at any time before attempting to cross the track, as a matter of law, he cannot recover for injuries received in a collision, though the defendant railway company failed to give the signal of its approach required by statute.—MILLER v. TERRE HAUTE & I. R. Co., Ind., 43 N. E. Rep. 257.

154. RAILROAD COMPANY—Evidence.—In an action for the death of a railway employee, alleged to have been due to the faulty construction of the railroad, an en-

gineer, testifying as to the construction of the track and the probability of deposits of sand thereon in rainy weather, could not, on cross-examination, state that the engineers on the road were all aware of that fact, this being a mere inference.—UNION PAC. RY. CO. v. O'BRIEN, U. S. S. C., 16 S. C. Rep. 618.

155. RAILROAD COMPANY — Grant of Free Transportation.—An agreement by a railroad company, in consideration of the grant to it of the right to use water from certain land, that the owner of the land should be entitled forever thereafter to travel without charge upon the trains of the company, did not give him a right to free transportation over lines subsequently constructed or leased by it.—WESTERN MARYLAND R. CO. v. LYNCH, Md., 34 Atl. Rep. 40.

156. RAILROAD COMPANY — Operation in City — Ordinance.—Municipal consent is requisite to enable any railroad company, whether incorporated by special act of assembly or under the general railroad laws, to enter upon and occupy the public highway of the city, unless its charter contains authority therefor in express terms or by necessary implication.—CITY OF PHILADELPHIA v. RIVER FRONT R. CO., Penn., 34 Atl. Rep. 60.

157. RAILROAD COMPANY—Street Railroads—Contributory Negligence.—Defendant requested the court to charge that, if defendant's employee was negligent, yet if plaintiff's employee was likewise negligent, and such negligence directly contributed to the injuries, the verdict should be for defendant, unless "defendant's employee in charge of the car became aware of the negligence of plaintiff s servant in time to have avoided injuring the team, by the exercise of proper care:" Held, that it was error to modify such instruction by inserting, after the words "plaintiff's servant," the words "or might have become aware thereof by the exercise of reasonable care."—JOHNSON v. STEWART, Ark., 34 S. W. Rep. 890.

158. RAILROAD COMPANY—Street Railroads—Contributory Negligence.—A person about to cross the track of a street railway at a street crossing is bound to exercise care proportioned to the danger to be avoided, and the consequences which might result from want of it, conforming in amount and degree to the particular circumstances surrounding him; but it is only ordinary care which is required—that which might reasonably be expected of persons of ordinary prudence. Ordinary care does not require him to anticipate negligence on the part of those operating the railway. And while he should use his faculties for his own protection, it is not negligence *per se* for him to omit to look in both directions for the approach of a car. Whether it is or not negligence depends upon the circumstances.—CINCINNATI ST. RY. CO. v. SNELL, Ohio, 43 N. E. Rep. 207.

159. RAILROADS—Consolidation — Filing Articles of Agreement.—Under Acts 1891, p. 84, §§ 1, 2, providing that the secretary of State shall charge certain fees for filing and recording an agreement of railroad companies to consolidate, and providing that he shall "neither file nor record any of the articles unless all the fees for filing are first paid," the payment of the fees is a condition precedent.—STATE v. CHICAGO & E. I. R. Co., Ind., 43 N. E. Rep. 226.

160. RECEIVERS—Appointment.—Gen. St. § 1313, providing, on application by one partner for the appointment of a receiver for the firm, that the court "shall forthwith appoint a day for the hearing upon the same, and shall make such order relative to notice of such application and hearing to the other partners as may be deemed proper; said hearing to be at least six days from the service of such order of notice," does not prevent the court, with the consent of all the parties, from appointing a receiver immediately on application.—LONGSTAFF v. HURD, Conn., 34 Atl. Rep. 91.

161. RELIGIOUS SOCIETIES—Injunction.—To settle the rights of contending factions of an unincorporated church to the use of the church property, injunction will lie at the instance of the faction entitled to the property to restrain trespasses by the other faction thereon.—FULBRIGHT v. HIGGINBOTHAM, Mo., 34 S. W. Rep. 875.

162. REPLEVIN—Dismissal.—A plaintiff, in an action of replevin, who has obtained possession of the property under the writ, cannot be permitted, without the consent of the defendant, to dismiss the action. When a plaintiff in replevin, who has obtained the property, fails in his proof, or fails to prosecute the action, the defendant is entitled to judgment, and a trial of his right of property or possession, for the purpose of establishing his damages.—GARBER v. PALMER, BLANCHARD & CO., Neb., 66 N. W. Rep. 656.

163. REPLEVIN—Fraud.—In replevin for a stock of goods, which defendant agreed to exchange with plaintiff for land, where the jury find that the trade was not induced by fraud on plaintiff's part, and also that the stock of goods was delivered to plaintiff according to contract, defendant cannot claim that he was injured by a refusal to charge that one may refuse performance of a contract which he thinks was induced by fraud.—GLASS v. RAUWOLF, Penn., 34 Atl. Rep. 55.

164. SALE—Breach by Vendee.—A vendor cannot recover for breach of a contract to purchase horses where he was unable to make delivery on the contract date because the horses were in possession of a third person, who claimed an interest therein and refused to surrender possession of them.—DAVIS v. GILLIAM, Wash., 44 Pac. Rep. 119.

165. SALE BY BROKER—Custom—Evidence —In an action for goods sold through brokers, testimony that, when a broker makes a sale, each party receives a memorandum from the brokers, but that neither party receives any writing from the other, is not admissible to prove the contract.—E. GODDARD & SONS v. GARNER, Ala., 19 South. Rep. 513.

166. SALE—Construction of Contract.—A sale of stock in a corporation, together with the seller's interest in all manufactured goods "on hand in the factory of said company," did not affect his right to hold manufactured goods which were then in his own store, and which had been transferred or pledged to him for money advanced, under a valid agreement with the corporation to carry on its business.—NOVELTY PAPER BOX & SUPPLY CO. v. STONE, Wis., 66 N. W. Rep. 600.

167. SALE—Rescission.—Where the purchaser of goods used no artifice nor made any misrepresentations either as to his habits or financial condition, the fact that his liabilities exceeded his assets at the time of the purchase, or that he was a man of reckless habits, will not justify the seller in setting aside the sale, and in replevying the goods from one to whom they were transferred for the benefit of certain preferred creditors.—SWEET v. CAMPBELL, Ind., 43 N. E. Rep. 236.

168. SALE—Rescission.—In a trial of the right of property between vendors claiming the goods sold for the fraud of the vendee and attaching creditors of the vendee, it was error to charge that the refusal of the vendors to surrender a note executed by the vendee for the price would not be an affirmance, where it was not clear whether the note was retained as indemnity for the goods disposed of by the vendee, or whether, in retaining it, the vendees intended to affirm the sale.—RABY v. SWEETZER, Tex., 34 S. W. Rep. 779.

169. SALE—Rescission for Fraud.—Where the vendee had sold part of the goods procured by fraud, the vendor, by claiming the part remaining in possession of the vendee, and receiving from the vendee's purchaser the price of the goods he received, disaffirmed the sale —RABY v. FRANK, Tex., 34 S. W. Rep. 777.

170. SALES—Manufacture from Sample—Title.—In the sale of articles to be manufactured, the title to the articles passes, if manufactured in accordance with the contract, immediately upon receipt thereof by the buyer.—JOHNSON v. HIBBARD, Oreg., 44 Pac. Rep. 287.

171. TAXATION—Exemptions.—Statutory exemptions from taxation will not be extended by judicial con

struction to property other than that expressly designated.—THURSTON COUNTY v. SISTERS OF CHARITY OF HOUSE OF PROVIDENCE, Wash., 44 Pac. Rep. 252.

172. TAXATION — Exemptions — Church Property. — Gen. St. § 3823, provides that any church or ecclesiastical society may hold, exempt from taxation, personal property, consisting of bonds, mortgages or funds invested, to an amount not exceeding $10,000, etc.: Held, that the investment of the funds of such church or society in productive real estate does not render it exempt from taxation.—FIRST UNITARIAN SOC. OF HARTFORD v. TOWN OF HARTFORD, Conn., 34 Atl. Rep. 89.

173. TAXATION — Payment of Taxes — Recovery. — Where a threatened sale of land for alleged delinquent taxes will create a cloud on title, the owner may, on payment of the amount under protest, recover the same.—MONTGOMERY v. COWLITZ COUNTY, Wash., 44 Pac. Rep. 259.

174. TAXATION — Void Taxes — Injunction. — A complaint to have an order increasing the assessed value of property a specific amount declared void, and to enjoin the collection of taxes assessed thereon, need not allege payment or tender of any taxes.—YOCUM v. FIRST NAT. BANK OF BRAZIL, Ind., 43 N. E. Rep. 231.

175. TAX SALE—Mandamus.—19 St. at Large, p. 863, § 2, requires the sheriff to sell land for taxes, and to make title to the purchaser on his compliance with his bid, and to pay any surplus from the proceeds to the delinquent taxpayer: Held, that where the sheriff makes a sale, and enters the purchaser's name in the book of sales, *mandamus* will lie to compel him to make a deed, on his refusal to do so after the purchaser offers to comply with his bid, etc.; and this though the sheriff, after the sale, and before such refusal, receives from a mortgagee the taxes due on the land.—STATE v. LANCASTER, S. Car., 24 S. E. Rep. 198.

176. TRIAL — Document in Evidence.—A trial court should never permit a document introduced in evidence to be withdrawn, unless the party so withdrawing it, at the time, leaves with the reporter a concededly correct copy of the document withdrawn; and the furnishing of such copy should be made a condition precedent for leave to withdraw the original document.—MCFARLAND v. WEST SIDE IMP. CO., Neb., 66 N. W. Rep. 637.

177. TROVER AND CONVERSION—Landlord's Lien.—A conversion of goods on which a landlord has the statutory lien for rent provided for by Code, § 3069, by one who has notice of such lien, gives the landlord a right of action against the wrongdoer for the damage sustained.—COUCH v. DAVIDSON, Ala., 19 South. Rep. 507.

178. TRUST DEED—Foreclosure—Parties.—In a suit to foreclose a deed of trust given to secure the bonds of a corporation, the trustee is not a necessary party.—HAMMOND v. TARVER, Tex., 34 S. W. Rep. 729.

179. VENDOR AND PURCHASER — Purchase Money — Limitations.—Since an action at law may be maintained by a vendor to recover from a purchaser on an implied promise to pay the purchase money, an action to enforce such promise in equity is governed, as to limitations, by Code, § 2762, providing that whenever there is concurrent jurisdiction the provisions limiting a time for such action at law shall apply to all suits for the same cause in equity.—WASHINGTON v. SORIA, Miss., 19 South. Rep. 485.

180. VENUE—Undue Influence.—Plaintiff is entitled to a change of venue on an application which alleges that defendant has undue influence over the judge, and over the inhabitants of the county, and that knowledge of such facts first came to plaintiff on the day of filing his reply, and which was made as soon as such knowledge was acquired, and on the day on which the cause was set for hearing, and was filed in the presence of defendant and his attorney, and immediately thereafter delivered to such attorney with the file mark thereon, though formal notice of filing (Rev. St. § 2262), was not given.—DOUGLASS v. WHITE, Mo., 34 S. W. Rep. 867.

181. WATER RIGHTS — Ice.—The lessee of a mill with water power and rights of flowage appurtenant thereto, not being a riparian proprietor upon the mill pond, cannot sue for the removal of ice therefrom, his right of flowage or water power not being lessened thereby.—REYSEN v. ROATE, Wis., 66 N. W. Rep. 599.

182. WATERS—Riparian Rights—Irrigation.—A riparian owner may pump water from a stream for irrigation purposes, provided he takes no more than his proportionate share, the method of diversion being immaterial.—CHARNOCK v. HIGUERRA, Cal., 44 Pac. Rep. 171.

183. WATERS—Surface Water — Obstruction.—A railroad company whose line of road runs through low lands, subject to overflow from streams, cannot be held liable for damages because of the obstruction which its embankment opposes to the drainage of the flood and surface waters, where no streams are obstructed, and it is not shown that its road is improperly constructed for railroad purposes, such obstruction being an incident to the use of its property, for which it paid in obtaining its right of way.—YAZOO & M. V. R. CO. v. DAVIS, Miss., 19 South. Rep. 487.

184. WILL—Attestation—Witness.—The signing of the name of a witness to the execution of a will by another, at the request of the witness, and in her presence and that of the testatrix, is a sufficient attestation; the witness, though able to write, being temporarily so far incapacitated that she wrote with difficulty, and was in the habit of using an amanuensis.—IN RE CRAWFORD'S WILL, S. Car., 24 S. E. Rep. 70.

185. WILL—Construction.—Testimony as to the intention of a testatrix to remove the *situs* of her property from one State to another, or of her belief as to the division that would be made of her property under the will in case of the death of a beneficiary, no such contingency being provided for in the will, is inadmissible in an action for construction of her will.—CLARKE v. CLARKE, S. Car., 24 S. E. Rep. 202.

186. WILL — Executory Devise.—A limitation over, after an estate in fee conditional, may be supported as an executory devise, provided such limitation be not void for remoteness.—SELMAN v. ROBERTSON, S. Car., 24 S. E. Rep. 187.

187. WILL — Personal Effects.—Testator bequeathed to claimant "all my jewelry, wearing apparel, and personal effects, except such of the same as are herein otherwise disposed of." He also made several specific bequests of effects of the nature of jewelry and wearing apparel, but nowhere specifically disposed of articles of furniture: Held, that the phrase "personal effects," in the bequest to claimant, did not include personal property in testator's house, such as furniture and pictures.—IN RE LIPPINCOTT'S ESTATE, Penn., 34 Atl. Rep. 58.

188. WILLS — Interpretation — Legatees.—Testator gave his residuary estate to the "children" of certain deceased brothers and sisters, to be divided equally between them, the will reciting that it was testator's intention to give to each one of said children an equal portion, and that the children "now reside" in a certain place: Held, that the descendants of children dying after the date of the will took the portion their decedent would have received.—JONES v. HUNT, Tenn., 34 S. W. Rep. 693.

189. WITNESS—Transactions with Decedent.—Code, § 400 (providing that no party to an action or proceeding, nor any person who has a legal or equitable interest which may be affected by the event, shall be examined as a witness as to a transaction between the witness and a person then deceased, against an executor, when such examination or the judgment in such action or proceeding can in any way affect the interest of the witness), does not render one of two executors, who is a defendant, but who has no interest except in his representative capacity, incompetent as a witness for the plaintiff.—DEVEREUX v. MCCRADY, S. Car., 24 S. E. Rep. 77.

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CORRECTION.

In our issue of May 15th (last issue) the head notes of notes of recent decisions on Garnishment of Receiver on page 408 and Landlord and Tenant on page 411 became transposed. The decision on subject of Garnishment of Receiver had a head note on the subject of Landlord and Tenant and the decision on subject of Landlord and Tenant had a head note on the subject of Garnishment of Receiver.

The vexatious question as to the citizenship of corporations for the purpose of jurisdiction by federal courts has come squarely before the Supreme Court of the United States in the recent case of St. Louis & S. F. Ry. Co. v. James, 16 S. C. Rep. 621. Mr. Justice Shiras, who read the opinion of the court, wisely refrained from attempting to reconcile all the expressions used in the many apparently conflicting decisions on the subject, beginning with Insurance Co. v. Boardman, 5 Cranch, 57, and ending with Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U. S. 356, but contented himself with the deduction of the following propositions from them, viz.: 1st, that it is conclusively presumed that a State corporation suing or sued in a United States Circuit Court is composed of citizens of the State which created it, and hence it is deemed to come within the constitutional provision conferring jurisdiction upon the federal courts "in controversies between citizens of different States;" 2d, that a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, may accept authority from another State to extend its railroad into such State, and receive a grant of powers to own and control, by lease or purchase, railroads therein, and may subject itself to such regulations as may be prescribed by the second State, such legislation on the part of two or more States not being, in the absence of inhibitory legislation by congress, within the constitutional prohibition of agreements or contracts between States; 3d, that such corporations may be treated by each of the States whose legislative grants they accept as domestic corporations; 4th, the presumption that a corporation is composed of citizens of a State which created it accompanies it when it does business in another State, and it may sue or be sued in the federal courts in such other State as a citizen of the State of its original creation; 5th, that a corporation of one State which is authorized by the law of another State to do business therein, and is endowed for local purposes with all the powers and privileges of a domestic corporation, is not deemed to be composed of citizens of the second State in such a sense as to confer jurisdiction on the federal courts in a suit against it by a citizen of the State of its original creation; 6th, that Act Ark. 1889, providing that every railroad corporation of any other State which had leased or purchased any railroad in Arkansas should file a certified copy of its articles of incorporation with the secretary of state, and should thereupon become a corporation of Arkansas, did not create an Arkansas corporation out of a foreign railroad corporation, in such a sense as to make it a citizen of Arkansas, within the meaning of the federal constitution, so as to subject it, as such, to a suit in the federal circuit court by a citizen of the State of its origin. Mr. Justice Harlan dissented.

Our readers will perhaps recall that when the notorious Durrant murder trial was pending in the criminal court of San Francisco, one of the local theaters undertook to produce a play, the scenes, incidents and characters in which bore a striking resemblance to the facts of the defendant's case as established at the preliminary examination. Upon the application of the defendant who claimed that the production of the play, during the progress of his trial would be an interference with the administration of justice and deprive him of a fair and impartial trial, the court made an order directing the manager of the theater, who was advertising the production of the play, to desist and refrain from giving any public performance of the same and to cease from advertising it. On writ of *certiorari* the Supreme Court of California has annulled that order. The case is Dailey v. Superior Court, 44 Pac. Rep. 458.

The reasons for that conclusion are interesting and perhaps sound, though two of the members of the court dissent in a plausible opinion. The majority of the court take the ground that such an order was an attempted infringement upon rights guaranteed by the constitution which provides that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. The right of the citizen to freely speak, write, and publish his sentiments they say is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the constitution in the opinion of the court was the abolishment of consorship, and for courts to act as censors is directly violative of that purpose. The court is also of the opinion that there is no jurisdiction in equity to restrain a threatened publication of an injurious character. The trial court had ample power to protect itself in the administration of justice after the contempt was committed. As to the offender, it could punish him; as to the defendant on trial, he could be deprived of no rights by any act of this petitioner. If the publication deprived him of a fair and impartial trial at that time, a second trial would have been awarded him.

NOTES OF RECENT DECISIONS.

CONFLICT OF LAWS—NOTE—PLACE OF EXECUTION.—In William Glenny Glass Co. v. Taylor, 34 S. W. Rep. 711, decided by the Supreme Court of Kentucky, the joint note of two persons payable in New York, given to raise money for one of them, was first signed by one of them in Washington, D. C., and forwarded by him to the other, residing in Kentucky, who there signed it and forwarded it by mail to the payee in New York who there received it. It was held a Kentucky note. The court says in part:

We will not assume, nor does the evidence authorize such a conclusion, that the brother living in Washington City, and executing the note in that place, and his sister executing the note in Bracken county, Ky., regarded or expected their liability to be determined by the statute of New York, and, when sued in Kentucky, could defeat the recovery upon the paper on the ground that the charge of the extra interest rendered the entire obligation void. The note, when signed by Mary D. Bradford in Kentucky, and inclosed to the payee, was an executed instrument; as much so as if the payee had been present, and the note delivered to her, in Kentucky. As said in Bank v. Low, 81 N. Y. 572: "It cannot be contended that a party who goes into another State, and there makes an agreement with a citizen of that State for the loan or forbearance of money, can render his obligation vain by making it payable in another State, according to whose laws the contract would be usurious." In the case of Vliet v. Camp, 13 Wis. 198, it is said: "The law of the place of payment does not necessarily govern the rate of interest which may be contended for." It is a question of intention, and all the facts must be considered in order to determine what law the parties looked to as controlling their rights under the contract—whether the law of the place where the contract was entered into, or the law of the place where it was to be performed. Nor is the rule here recognized in conflict with the cases heretofore decided by this court in Goddin v. Shipley, 7 B. Mon. 575; Hyatt v. Bank, 8 Bush, 193; Young v. Harris, 14 B. Mon. 447. Ordinarily, the place of performance fixes the nature and interpretation to be given the contract, and, as in the case of Young v. Harris, if the payee of a note residing in Covington, Ky., indorses it in blank at that place, and puts it in his pocket, and after this goes to Cincinnati, and there sells and delivers it to another, who pays him the consideration, the mere physical act of indorsement, although performed in Covington, forms no contract, but it is the transaction in Cincinnati that creates the contract, and therefore the law of Ohio must govern. In this case we are asked to forfeit the principal and interest of a note executed out of the State of New York, and doubtless the proceeds were used out of that State, in the hands of one to whom it was assigned, by a payee having no beneficial interest in the proceeds, but who had agreed to become the payee, and perhaps to advance the money to meet the necessities of one of the obligors, who was the brother of the other; and to do so would be, in our opinion, to enforce a law of a State other than that in which the note was fully executed, and by which (the Kentucky law) the legal effect of the transaction must be governed.

CRIMINAL LAW—LARCENY—CONVERSION BY BAILEE.—In Commonwealth v. Rubin, 43 N. E. Rep. 200, decided by the Supreme Judicial Court of Massachusetts, defendants induced a servant to deliver a horse belonging to his master (which he had in his possession) to them, under an agreement that they should deliver it to the master; but, instead, they soon thereafter converted it to their own use. It was held that a conviction for larceny was